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No. 90-1179

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

STATE FARM GENERAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, AND STATE FARM FIRE AND CASUALTY COMPANY,

Petitioners,

v.

MURIEL E. KRASZEWSKI, DAISY O. JACKSON, AND WILDA TIPTON, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION AND RESPONDENTS' APPENDIX VOLUME I

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QUESTION PRESENTED

At the remedies phase of an employment discrimination class action, do district courts have discretion to provide for the accrual of back pay for individual class members as seems appropriate in light of the facts and circumstances of the case?[1]

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[1] Respondents contend that the question set forth in the Petition is not, in fact, presented by this case. See pp. 13-16, *infra*.

LIST OF PARTIES

There are no parties to this action other than those identified in the caption of the within action.

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STATEMENT OF THE CASE

A. Procedural History of the Case

On June 1, 1979, the complaint was filed by two women, Muriel Kraszewski and Daisy O. Jackson, against State Farm Insurance Companies alleging discrimination on the basis of sex in recruitment and hiring into the entry-level sales position, trainee agent. After substantial discovery efforts, on September 9, 1981, the district court certified a class of female applicants and deterred applicants in State Farm's three California regions.[1] On November 6, 1981, the district court bifurcated the action into a class liability phase (Stage I) and an individual remedy phase (Stage II).

The class liability trial consumed 48 trial days over an eleven month period (March 31, 1982 through February 14, 1983). After voluminous post-trial briefs and a series of motions, the district court, on April 29, 1985, issued a 175-page Findings of Fact and Conclusions of Law, finding State Farm liable for intentional sex discrimination in the recruitment, selection and hire of Trainee Agents within the State of California.[2] These Findings and Conclusions were never appealed. Subsequently, the parties filed cross motions regarding the procedures to determine Stage II remedies. On July 17, 1986, the Court ruled that an individualized procedure determining damages would be followed and encouraged the parties to

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[1] 27 Fair Empl. Pract. Cases (BNA) 27 (N.D. Cal. 1981). (Resp. App. 1a.)

[2] 38 Fair Empl. Pract. Cases (BNA) 197 (N.D. Cal. 1985). (Resp. App. 98a.)

negotiate remaining differences.[3] This order was never appealed. On January 13, 1988, the parties presented to the district court for preliminary approval a Consent Decree Regarding Injunctive Relief and a Consent Decree Regarding Monetary Relief, Instatement Relief, And Notice ("Claim Procedure Consent Decree"). After a Rule 23 Fairness Hearing, the two decrees were approved on March 15, 1988. The Claim Procedure Consent Decree established the individualized hearing and settlement procedure which is now in progress.

B. Class Liability Findings

Plaintiffs-Respondents alleged discrimination on the basis of sex in the recruitment, selection and hire of State Farm "trainee agents," petitioners' entry-level insurance sales position. (Resp. App. 98a-100a.) The district court found that a career as a State Farm agent is "an attractive career that includes the prospect of high income, independence, and the backing of a company that provides excellent insurance products and service." (Resp. App. 108a-109a.) In fact, petitioners' Regional Vice President described the agent position as a "golden opportunity." (Resp. App. 109a.) The evidence showed that petitioners' California agents had an average net income of approximately $60,000 in 1981. (Resp. App. 120a-121a.) Agents often were promoted to agency managers, a position earning up to $125,000 per year. (Resp. App. 121a.)

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[3] 41 Fair Empl. Pract. Cases (BNA) 1088 (N.D. Cal. 1986). (Resp. App. 274a.)

As of 1975, when plaintiff Kraszewski filed charges of discrimination with the U.S. Equal Employment Opportunity Commission, 99.6% of petitioners' 1530 California agents were male.[4] (Resp. App. 123a.) In 1975, 95.4% of the trainee agents hired by petitioners were male, despite the fact that the position had virtually no minimum qualifications.[5] (Resp. App. 123a.) In that year, 100% of the agency managers, agency directors and vice presidents who had responsibility for the recruitment and

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[4] Extensive statistical evidence was provided by plaintiffs-respondents. The trial court compared the number of women hired for the trainee agent position with relevant labor market availability of women for the position. The trial court found that State Farm's hiring of women differed from expected hiring of women by factors ranging from 17 to 66 standard deviations (less than one chance in ten to the 69th power to less than one chance in ten to the 967th power). (Resp. App. 164a-168a.) These statistical proofs go far beyond the guidelines established by this Court in *Hazelwood School District v. United States*, 433 U.S. 244 (1977) (2 to 3 standard deviations) and constitute some of the largest statistical disparities ever observed in a civil rights case.

[5] The evidence was "uncontradicted that there [were] no educational requirements to become a trainee agent." (Resp. App. 151a.) In fact, one State Farm agency manager testified that "an individual need not go beyond the eighth grade to become a State Farm agent." (Resp. App. 110a.) There were no prior job experience requirements and petitioners hired male agents with a wide variety of prior job experiences. (Resp. App. 111a.) Instead of minimum or objective qualifications, petitioners relied on a wide variety of subjective factors in recruiting and hiring trainee agents. (Resp. App. 203a-206a.) The district court found that "recruiting was governed by these subjective criteria that had neither specific fixed content nor called for discrete judgment, and whose relationship was uncertain and discretionary." (Resp. App. 208a.)

hire of agents were male. (Resp. App. 122a.) Petitioners did not employ a female agency manager until 1981 (at a time when they employed 154 males in agency management positions). (Resp. App 122a.)

The district court found that women were actively discouraged from becoming trainee agents by being "lied to, and/or given false and misleading information when they have inquired about the possibility of becoming trainee agents. Women have been told about educational requirements that did not exist, financial requirements not founded in fact, and false information about the availability of positions. It was made clear to many women that the hiring of a female trainee agent was a rare occurrence and their prospects for hire as trainee agents were not good. Women interested in becoming State Farm trainee agents were told that the trainee agent position was too dangerous and not suitable for women." (Resp. App. 183a.)

Petitioners relied heavily on male nepotism in recruiting and hiring trainee agents. "In fact, it was the stated policy of State Farm between November 1965 and November 1977 that State Farm looked with favor upon 'sons and son-in-laws, brothers, brother-in-laws, and other close relatives of State Farm agents.' " (Resp. App. 216a.) Statistics showed that 383 of the agents employed by petitioners in California had relatives at State Farm, and that, of this number, 370 (96.6%) were male. (Resp. App. 217a.) The trial court found that "State Farm's reliance on male nepotism and the widespread knowledge of the use of male nepotism . . . ensured that women were grossly underrepresented in State Farm's sales force." (Resp. App. 220a.)

Petitioners claimed at trial that certain specific procedural guidelines were followed in the selection of trainee agents. The trial court found, however, that the hiring procedures were "unmonitored, unregulated and undefined." (Resp. App. 213a.) The trial court stated that,

> Although State Farm claimed to use an elaborate 'selection pool' process for the recruitment and comparison of trainee agent candidates, their actual use was virtually nonexistent . . . . Not a single defense witness above the level of agency manager could testify as having seen records of a selection pool . . . . [N]ot a single writing exists in evidence documenting these pools or how the decision to select a particular person from a particular pool was made. In fact, the record reflects that trainee agents were often preselected without use of a selection pool.

(Resp. App. 213a-214a.)

The trial court concluded that

> Plaintiffs' evidence established a *prima facie* case of classwide disparate treatment of women applicants and deterred applicants, which was not rebutted by defendants. . . .
>
> Defendants' consistent discriminatory treatment of female applicants, method of publicizing trainee agent positions, recruitment practices, negative responses to inquiries by women regarding sales positions, and the predominantly male composition of defendants' managerial force, operated to discourage and deter potential female applicants for trainee agent positions.

(Resp. App. 271a.)

C. Imposition Of Sanctions On Petitioners and Their Counsel For Delay and Discovery Abuse

Pretrial discovery was unusually difficult. Prior to the Stage I class liability trial, "Plaintiffs were required to obtain nine separate Orders compelling Discovery, and the Court was required to hold special monthly discovery conferences to manage the litigation." *Kraszewski v. State Farm General Ins. Co.*, 36 Fair Empl. Pract. Cases (BNA) 1354, 1355-56 (N.D. Cal. 1983). (Resp. App. 21a.) Petitioners' obstruction of discovery caused the trial to be rescheduled from May 1981 to March 1982. Despite these orders and the time-consuming supervision of the district court, petitioners continued to refuse to provide the discovery ordered produced by the court. Petitioners' contumacious failure to provide discovery became clear at trial when petitioners attempted to offer in evidence the very documents that counsel for petitioners, in response to discovery requests, had earlier insisted did not exist. This caused the district court to appoint a Special Master to review all discovery matters and to make recommendations to the Court. (Resp. App. 22a.) After the Special Master issued a report and recommendations, and the parties had an opportunity to comment, the court made findings and imposed on petitioners a total of $439,858.42 in monetary sanctions for discovery abuse. (Resp. App. 21a-97a.)

Plaintiffs-Respondents had requested in discovery all types of documents that would have identified class members prior to trial. (Resp. App. 24a-26a.) Respondents had also sought discovery of computerized databases, including information that would have identified class members. (Resp. App. 26a-27a.) During pretrial

discovery, petitioners maintained that such information did not exist, but in mid-trial on May 11, 1982, it became apparent that such documentation did exist, both in hard-copy and computerized formats. (Resp. App. 21a.) The district court found that petitioners and their counsel "failed to make a good faith effort" to produce such discovery, in violation of two court orders. (Resp. App. 25a-26a, 28a.) The trial court found that the tardy mid-trial production of these documents "caused plaintiffs substantial actual prejudice, by seriously undercutting plaintiffs' ability to identify and locate other class members." *Id.* The mid-trial production of discovery not only inhibited plaintiffs' ability to prepare for trial, it also delayed for nearly a year their access to class members and potential claimants. During that time, many class members may have relocated without forwarding addresses. The number of meritorious claims that subsequently were not filed because of this delay will never be known.

Petitioners' non-compliance with legitimate discovery requests was frivolous in the extreme, as noted with exasperation by the district court:

> Defendants' September 1981 objection to 59 of plaintiffs' 73 Interrogatories propounded in June 1981 were dilatory, frivolous and wholly lacking in substantial justification. *The defendants' basic position* with respect to 40 of the 59 unanswered interrogatories – that defendants would not answer the questions until plaintiffs produced 'credible evidence' to support the allegations underlying the questions – *was recognizable as an absurdity to anyone even passingly familiar with the American discovery process.*

(Resp. App. 35a.) (Emphasis added.)

The district court characterized petitioners' "overall pattern of discovery abuse" as constituting " 'flagrant bad faith' and 'callous disregard for their responsibilities' both to plaintiffs and to this Court." (Resp. App. 39a.) The court found both petitioners and their counsel guilty of civil contempt and noted that "there is strong evidence in this case of 'wilful disobedience' of court orders by defendants and their counsel which might have warranted a finding of criminal contempt . . . . " (Resp. App. 43a.) Rather than finding petitioners in criminal contempt, however, the district court fashioned remedies designed to ameliorate the harm caused by petitioners' misconduct. This remedial order, including $439,858.42 in monetary sanctions, was not appealed and was paid by petitioners and their counsel.[6]

D. Remedies Proceedings and The Claim Procedure Consent Decree

Following the resolution of the discovery sanctions issues and the rendition of the Stage I class liability decision, the parties filed cross motions regarding the appropriate Stage II remedy for individual victims of

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[6] In the Stage II claim procedure, petitioners have been sanctioned by the Discovery and Motion Special Master for additional failures to produce relevant discovery in a timely manner. The sanction imposed was an order that an essential element of claimant's case was deemed satisfied. Without this sanction order, the claim would have been dismissed. Instead, over $200,000.00 was recovered in this claim. Similar sanctions for late production of discovery have been imposed on petitioners in three additional claims which have yet to come to hearing.

class discrimination. "After lengthy oral argument and upon careful consideration of the extensive briefing," the trial court issued a remedies order which provided for an individualized claims procedure. (Resp. App. 274a.) The trial court determined that the goal at the remedy stage was to " 'make victims of unlawful employment discrimination whole' " (citing *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)), and that the *preferred* method of determining damages in Title VII cases is by using individualized hearings. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-372 (1977).[7] (Resp. App. 275a.)

The trial court did not fashion the details of the individual claim procedure but, instead, directed the parties to negotiate the format for the Stage II proceedings.

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[7] Petitioners claimed that "special circumstances" warranted departure from the normal preference for individualized remedy proceedings. (Resp. App. 276a.) The trial court found, however, that the special circumstances of this case *favored* individualized proceedings. (Resp. App. 277a.) Unlike some Title VII remedies cases that had permitted the distribution of damages on a formula basis because many different job positions, promotions, evaluations, discipline, terminations, and/or work assignments were at issue, this case involves only one entry-level job position and two types of discrimination (recruitment and hire). (Resp. App. 277a-278a.) Moreover, in this case, plaintiffs-respondents agreed to the use of stipulated earnings, calculated by year, in order to make the back pay calculation simple. (Resp. App. 278a.) The trial court also considered the large monetary value of individual claims. With individual claims worth hundreds of thousands of dollars each, "the presumption in favor of individualized hearings would appear to be critical." (Resp. App. 279a.)

(Resp. App. 285a.) The parties took the court's directive seriously and over the course of eighteen months, negotiated and agreed to a 31-page Consent Decree Regarding Injunctive Relief and a 105-page Claim Procedure Consent Decree (supported and explained by approximately 400 pages of exhibits).

After the Rule 23 fairness hearing and extensive notices to the class, approximately 6,500 initial claims were filed. Initial claimants were required to pass an insurance aptitude test and two California insurance license tests. After testing of claimants and the weeding-out of defective claims, in late 1989 approximately 1,000 women filed final claims. These claims are now being settled and adjudicated by a group of nine Special Masters, including two former United States District Judges, the Honorable Charles B. Renfrew (who is the Chief Special Master) and the Honorable Raul A. Ramirez, one former California Supreme Court Justice, and six labor arbitrators with substantial Title VII experience. All the Special Masters and all the claim procedures were agreed to by petitioners.

The Claim Procedure Consent Decree permitted the issue of back pay liability to be presented to the district court to choose the appropriate back pay cutoff date. However, the parties expressly agreed in the Decree that back pay "shall be calculated to the date of judgment, except as otherwise provided in this Decree, as set forth in Exhibit 9." Section VII.G.4.e; Claim Procedure Consent Decree at 59:18-21. (Resp. App. 289a.) Exhibit 9 states that, "[u]nder this Decree, entitlement to damages can arise only on one of five dates ('Entitlement Dates')." (Resp. App. 289a.) These five "Entitlement Dates" are (1)

the date petitioners settle an individual claim for full value; (2) the date petitioners settle multiple claims for full value; (3) the date on which a claim is settled for less than full value; (4) the date of judgment on an individual claim by a Hearing Master; or, if an appeal is taken from an individual claim judgment; (5) the date of the written decision by the Chief Special Master. Decree Exhibit 9 at 12:21-13:26. (Resp. App. 294a-295a.) For all judgments and automatic settlements, Exhibit 9 clearly provides that "back pay shall be calculated to the Entitlement Date . . . . "[8] Exhibit 9 at 13:27-15:24. (Resp. App. 295a-296a.) Thus, the Claim Procedure Consent Decree *expressly* provides that back pay "shall be calculated to the date of judgment." The date now proposed by petitioners for cutting off back pay, the date of final approval of the Consent Decree (March 15, 1988), is not a permitted date under the Decree. Petitioners simply bargained away the remedy they now seek from this Court.

Despite the express terms of the Claim Procedure Consent Decree, petitioners subsequently filed a motion with the district court requesting that back pay be cut-off on the date of the Consent Decree, rather than as of the date of individual claim judgment, as provided by the Consent Decree. The district court decided the back pay issue based on its careful review of the specific facts of the case and the application of Title VII law to those facts.[9] The district court recognized that "the clear thrust

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[8] The only exception to this rule is for "negotiated settlements."

[9] The trial court declined to rule on the Exhibit 9 Decree issue, stating simply that "we are not experts on the *Kraszewski* Consent Decree." (Pet. App. A-19.)

of Title VII remedial law is to award back pay until the date of final judgment." (Pet. App. A-13.) However, this did not end the district court's analysis. The district court carefully considered each contention advanced by petitioners in order to determine whether its discretion should have been exercised in favor of early termination of back pay. (Pet. App. A-13-20.) Only after considering each of petitioners' claims did the district court apply the general remedial rule of back pay to the date of individual judgment.[10] The Ninth Circuit subsequently described the district court's opinion as an "extremely thorough, thoughtful and well-reasoned" one which "weigh[ed] all the interests involved and balanc[ed] them carefully." (Pet. App. A-3.)

On review, the Ninth Circuit recognized that "Title VII grants a district court broad discretion to formulate a remedy for victims of unlawful discrimination." (Pet. App. A-8.) In response to petitioners' claims that discretion had not been exercised, the Ninth Circuit held that, "the district court carefully considered a number of reasons proferred by State Farm for departing from the general rule of awarding back pay until judgment and, after weighing all the facts and circumstances, found those reasons not to be compelling . . . Here, having determined in his discretion – which must be guided by prior Title VII rulings – that State Farm's reasons were

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[10] The district court actually awarded less than full back pay, as it deducted one year for institutional delay caused by the district judge's illness. (Pet. App. A-18-20.)

not compelling, the district court properly applied the general rule." *Id.*[11]

REASONS FOR DENYING THE WRIT

I

THE "QUESTION PRESENTED" IN THE PETITION IS NOT IN CONTROVERSY IN THIS CASE

The sole question presented by the petition is:

> At the remedies phase of an employment discrimination class action, do district courts have discretion to provide for the accrual of back pay for individual class members as seems appropriate in light of the facts and circumstances of the case?[12]

Petitioners argue that such discretion should exist, and suggest that the courts below held to the contrary. In fact, however, both the court of appeals and the district court accepted petitioners' contention that district courts enjoy discretion in determining when the period of back pay liability should end. Petitioners lost below, not because the lower courts concluded there was no such discretion,

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[11] The Ninth Circuit found error only in the district court's deduction of back pay for the district judge's illness. The Ninth Circuit held that *NLRB v. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 264-66 (1969), *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), and *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976) require that the costs of delay not attributable to either the employer or the employee are to be borne by the wrongdoing employer, not the wronged employee. (Pet. App. A-8.)

[12] Petition at 1.

but because the district court, in the exercise of that discretion, rejected the liability cut-off date that had been urged by petitioners. Thus, the question proposed by the petition simply is not in controversy in this case.

The district court did not hold, as petitioners suggest, that it was compelled to utilize the cut-off date urged by respondents regardless of "the facts and circumstances of the case." On the contrary, the district court's decision contains a detailed discussion of just those facts and circumstances, carefully analyzing each argument advanced by petitioners. (Pet. App. A-13 to A-18.) The district court recognized that the decision necessarily involved an exercise of "our equitable power." (Pet. App. A-11.) The trial judge described some of the issues raised by petitioners' arguments as

> subtle, interesting, and not easy to resolve. However, on balance we agree with plaintiffs.[13]

Although the district judge recognized that most reported Title VII cases supported the cut-off date advanced by respondents, the judge did not regard that as conclusive. On the contrary, the judge indicated a willingness to depart from that general practice if petitioners could "advance compelling reasons" for doing so. (Pet. App. A-13.)

Petitioners lost not because the trial court believed it lacked discretion to set the earlier cut-off date urged by petitioners, but because the district court simply found unpersuasive petitioners' arguments for exercising its

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[13] (Pet. App. A-14.)

discretion in that manner. Petitioners assert that the district court held that

> absent compelling circumstances . . . its equitable discretion [was] confined by case law that virtually compel[led] full accrual.

(Pet. App. A-11.)[14]

The passage which petitioners quote, however, is not from the holding of the district court, but from the court's summary of the *contentions of trial counsel*. The full quotation, before the ellipsis, reads:

> *Plaintiffs* agree that the Court's power is equitable, but *argue vigorously* that our equitable discretion is confined by case law that virtually compels full accrual.

(Pet. App. A-11.) (Emphasis added.)

Petitioners describe the district court as having issued an

> order ('June 8 Order'), ruling that Title VII did not permit the exercise of the 'wide discretion' that the Supreme Court had authorized in *Albemarle Paper Co. v. Moody*.

(Pet. 4.)

In fact, there is no such "ruling" in the district court's Order.

Petitioners assert that the court of appeals announced a "compelled,"[15] "rigid rule"[16] regarding the cut-off date for back pay liability, deliberately stripping the district court of any discretion on this issue. On the contrary, the

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[14] (Pet. 4.)

[15] (Pet. 5.)

[16] (Pet. 6.)

Ninth Circuit expressly recognized that a "district court's calculation of a back pay award is reviewed only for an abuse of discretion." (Pet. App. A-4.) The district court's decision was sustained, not because the appellate court held it was compelled by a "rigid rule," but because the circuit court concluded that "the district judge did not abuse his discretion." (Pet. App. A-4.)

The court of appeals expressly rejected petitioners' suggestion that the district court might have thought itself controlled by any such rigid rule:

> Title VII grants a district court *broad discretion* to formulate a remedy for victims of unlawful discrimination. State Farm argues that in this case the district judge failed to exercise his discretion. It claims that the judge concluded he was required to rule for plaintiffs. State Farm simply misreads the district judge's opinion. The district court carefully considered a number of reasons for departing from the general rule of awarding back pay until judgement and, after weighing all the facts and circumstances, found those reasons not compelling.

(Pet. App. A-8.) (Emphasis added.)

II

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR WITH DECISIONS OF OTHER COURTS OF APPEALS

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), this Court held that the fashioning of a back pay remedy for a Title VII violation involved the exercise of equitable discretion. 422 U.S. at 421. Both courts below properly recognized the existence of that discretion. The particular

manner in which that equitable discretion was exercised by the courts below is entirely consistent with *Albemarle*. *Albemarle* emphasized that the remedial sections of Title VII were "intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible." In *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court reiterated that remedial orders should be framed "to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case."[17] 424 U.S. at 770-771.

The decisions below, providing that the back pay owed to each claimant shall run until the date on which the court determines the merits of her particular claim, is entirely consistent with *Albemarle* and *Franks*.[18] No

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[17] Petitioners cite *Library of Congress v. Shaw*, 478 U.S. 310 (1986), for the proposition that interest alone compensates for the delay in receiving back pay. The *Library of Congress* case, however, is not a back pay case at all; it is an attorneys' fees case whose holding is based on sovereign immunity, not Title VII remedies law. In fact, the holding in *Library of Congress* is directly contrary to the purpose for which petitioners assert it, as interest was *denied*.

[18] This Court has made clear that the burden of institutional delay must be placed on the lawbreaker, not the victim. *NLRB v. Rutter-Rex Manufacturing Co., supra*. In *Rutter-Rex*, the NLRB had taken five years to file its back pay specification for 600 claimants. This Court noted that the purpose of back pay is to make employees whole for economic losses and concluded that back pay could not be limited due to delay in processing claims. The Supreme Court stated that, "[T]he Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees." 396 U.S. at 264. In this

(Continued on following page)

individual claimant has the right to any relief until she obtains an individual judgment or settlement. The date of that judgment or settlement is the date on which State Farm's discriminatory practices will have been remedied for her.

The practice in all ten of the circuits to consider this issue has been to approve continuation of back pay liability until the date when a plaintiff's individual claim has been finally and fully adjudicated. *See, e.g., Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 473 (D.C. Cir. 1987) (compensation for period of time until "judgment entered on her Title VII action" is a "permissible award of back pay"); *Kyriazi v. Western Electric Co.*, 465 F. Supp. 1141, 1156-57 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981) ("The 'cutoff' date for back pay shall be the date of entry of final judgment"); *EEOC v. Korn Industries, Inc.*, 662 F.2d 256, 263 (4th Cir. 1981) (It was error for the district court to cut off back pay liability on an arbitrary date prior to judgment); *Cheschein v. Liberty Mutual Insurance Co.*, 713 F.2d 1142, 1150 (5th Cir. 1983) (It was proper

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case, the institutional delay has been caused by petitioners' abuses of the discovery process, their decision to engage in an eleven-month long liability trial, the law's preference for individual damage proceedings, and petitioners' *agreement* to an individualized claim procedure.

Rutter-Rex is directly applicable to this case because this Court has consistently held that the basic principles developed under NLRA guide courts in tailoring remedies under Title VII. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982); *Teamsters*, 431 U.S. at 366-67; *Franks*, 424 U.S. at 768-70; *Albemarle*, 422 U.S. at 419.

for district court to terminate back pay period as of "entry of final judgment"); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1158-59 (6th Cir. 1985) ("victorious Title VII plaintiffs are presumptively entitled to back pay until the date judgment is entered in the case"); *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599 (7th Cir. 1985) ("judgment in her favor"); *Paxton v. Union National Bank*, 688 F.2d 552, 574 (8th Cir. 1982) ("to the present"); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986) ("date of final judgment"); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979) ("date of judgment"); and *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473 (11th Cir. 1985) ("date of judgment").

Petitioners claim that the Ninth Circuit's decision in favor of back pay to judgment conflicts with *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977), and claim that the Ninth Circuit "simply ignored" *Stewart*. (Pet. 8:) Neither claim is accurate. The Ninth Circuit expressly discussed the *Stewart* decision.[19] The actual terms of the 1976 decision

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[19] The Ninth Circuit discussed *Stewart* as follows:

> The second case State Farm cites is *Stewart v. General Motors Corp.*, 542 F.2d 445, 454 (7th Cir. 1976), *cert. denied*, 433 U.S. 919, 97 S.Ct. 2995, 53 L.Ed.2d 1105 (1977), in which the court, without explanation, provided for the termination of back pay on the date the district court entered its decree. The opinion does not reveal whether or not this was the termination date the plaintiffs requested or even whether plaintiff agreed or disagreed with the date ordered by the court. In any event, we agree with the district court

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in *Stewart*, moreover, do not purport to forbid, under appropriate circumstances, an award of back pay running to the date of judgment.[20]

Since this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the case which established the strong preference for individual remedy proceedings, the Seventh Circuit has awarded back pay to judgment, as have the other circuits. In *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599 (7th Cir. 1985), the Seventh Circuit reversed a district court for failing to award complete back pay from the date of plaintiff's termination to the date of "judgment in her favor." *Id.* at 607 n.14. It is noteworthy that the Seventh Circuit in *Horn* did not consider *Stewart* to be a contrary holding, and, indeed, cited *Stewart in support* of its back pay to judgment order. *Id.* at 607. Likewise, in *Daniels v. Essex Group*, 740 F. Supp. 553 (N.D. Ind. 1990),

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> below that *Stewart*, which was decided before *Teamsters* and most of the other relevant cases, is not in line with present authority.

(Pet. App. A-7.)

[20] *Stewart* is not in conflict with the back pay to judgment award in this case because it is not clear in *Stewart* when the "actual remedying of discrimination" actually occurred. The injunction issued in *Stewart* could have remedied the discrimination that affected the individual plaintiffs and class members so that losses of back pay did not continue to accrue. Under such circumstances, continued back pay would not have been appropriate.

the district court interpreted Seventh Circuit authority to support the award of back pay to judgment.[21]

Petitioners never sought to appeal the district court's order in favor of individual hearings. Instead, petitioners entered into the Claim Procedure Consent Decree which not only establishes an individual hearing procedure, but also sets forth a specific schedule for claim hearings. This schedule is being exceeded, and the claim procedure is running *ahead* of the schedule agreed to by petitioners. Consequently, whatever the delay involved in providing individual remedies for victims, it has been agreed to by petitioners and is not at issue in this petition.

CONCLUSION

Petitioners object that the individual hearings will take years, but petitioners did not appeal the order for such hearings and they expressly agreed to the very schedule about which they now complain. Petitioners object that the decision below is going to cost them a lot

[21] In so ruling, the court cited a Ninth Circuit case, *Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986) and *EEOC v. Monarch Machine Tool Co.*, 737 F.2d 1444 (6th Cir. 1980) for the proposition that, "Back pay is to run from the date of plaintiff's termination until the date of final judgment." *Daniels*, 740 F. Supp. at 561. Both of these cases were cited by the Ninth Circuit in this case in reaching the same conclusion. Consequently, not only does the Seventh Circuit *not* interpret *Stewart* as a holding in conflict with an award of back pay to judgment, but district courts within the Seventh Circuit cite Ninth Circuit cases to support the same proposition petitioners are challenging herein. This is hardly the essence of a circuit conflict.

of money. (Pet. 10-11.) Petitioners do indeed face substantial financial liability, but the responsible parties are neither the district judge nor the court of appeals. For more than a decade after the adoption of Title VII, petitioners engaged in systematic and blatant discrimination on the basis of sex. Over a thousand highly qualified women were denied equal employment opportunities while less qualified men were given lucrative positions often paying in excess of $100,000 a year. These women are now recovering individual judgments and settlements at a rate that exceeds the claim hearing schedule agreed to by State Farm in the Claim Procedure Consent Decree. They also are recovering back pay to the dates of individual judgments, as called for by *Albemarle* and its progeny, and by the terms of the Claim Procedure Consent Decree. There is no reason to excuse petitioners from these terms to which they long ago agreed or from the back pay rule that has been accepted by this Court and all ten circuits that have ruled on this issue.

The "question presented" by petitioners is not, in fact, in controversy, and there is no circuit conflict. The Claim Procedure Consent Decree is operating exactly as it was designed to operate and exactly as agreed to by

petitioners. The petition for writ of certiorari should be denied.

Respectfully submitted,

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March 1991

APPENDIX

KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C 79-1261 TEH, September 9, 1981

Full Text of Opinion

HENDERSON, District Judge: – This matter came on for hearing on January 19, 1981, pursuant to plaintiffs' motion for provisional class certification, and was taken under submission. The Court having considered the lengthy papers of both parties, heard oral argument, and good cause appearing,

IT IS HEREBY ORDERED that plaintiffs' motion for provisional class certification be granted.

I. Statement of Facts

The above captioned action is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., as amended, by three individuals on behalf of themselves and other women applicants for State Farm Sales Agent Trainee positions in the State of California. Plaintiffs Muriel E. Kraszewski, Daisy O. Jackson, and Wilda Tipton allege that defendants State Farm General Insurance Company, State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company and State Farm Fire and Casualty Company ("State Farm") have discriminated against them and other members of the

alleged class on the basis of sex in the recruitment, hiring and training of Sales Agent Trainees.

In the instant motion, plaintiffs seek an order from this Court permitting this action to proceed on behalf of the following class:

all female applicants and deterred applicants who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as Sales Agent Trainees by defendant companies within the State of California.

II. The Legal Standard

According to Rule 23(a) of the Federal Rules of Civil Procedure, a plaintiff may not sue on behalf of a class unless 1) the class is so numerous that joinder of all its members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims of the representative parties are typical of those of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. See also East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395, 14 FEP Cases 1505 (1977); Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 16 FEP Cases 316 (9th Cir. 1977).

In addition to the prerequisites listed above, one of three elements under Rule 23(b) must be present before a class can be certified. In the instant case, Rule 23(b)(2) requires plaintiff to establish that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Fed.R.Civ.P. 23(b)(2).

The burden of establishing that the requirements of Rule 23 are met rests with the plaintiff who is seeking to have a class certified. Doninger v. Pacific Northwest Bell, 564 F.2d at 1308. To carry that burden, plaintiff must make a minimal showing of facts which support the existence of the criteria delineated in Rule 23. Doninger v. Pacific Northwest Bell, 564 F.2d at 1309.

However, to obtain class certification plaintiffs need not prove a prima facie case on the merits or convince the court that they will triumph on the merits at trial. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 2153, 9 FEP Cases 1302 (1974). As Judge Wisdom stated in Miller v. Mackey International, 452 F.2d 424, 427 (5th Cir. 1971),

> . . . the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

III. Plaintiffs Have Met the Requirements of Rule 23(a)

The court is convinced that the plaintiffs in the instant case have satisfied all of the requirements Rule 23(a) imposes for class certification.

a. Numerosity

As noted above, the first of these requirements specifies that a class action may be maintained only if "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). Neither the case law nor the rule itself adequately defines what constitutes numerosity. Jurists and legal scholars who have grappled

with this prerequisite have stated only that the determination of numerosity depends upon the facts in a given case and not simply a head count. Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 45, 15 FEP Cases 1640 (N.D. CA. 1977); 7 Wright and Miller, Federal Practice and Procedure §1762. Despite the reluctance of many to quantify the numerosity requirement, a survey of recent cases indicates that classes of less than thirty rarely will satisfy the numerosity requirement and those of a hundred or more most certainly will. 7 Wright and Miller Federal Practice and Procedure §1762; Schlei and Grossman, Employment Discrimination Law, 1979 Supplement at 279. Sagers v. Yellow Freight System, Inc., 529 F.2d 721, 12 FEP Cases 961 (5th Cir. 1976).

In the instant case, plaintiffs contend that the figure of 416 women who formally completed the application process (minus the 47 who were hired) easily satisfies the numerosity requirement. We agree. Defendants cite no case, and we are aware of none, in which joinder was considered practicable for a class of comparable size. Indeed, courts routinely have acknowledged the existence of numerosity even when far fewer people were involved. Gay v. Waiters' and Dairy Lunchmen's Union, 549 F.2d 1330, 14 FEP Cases 995 (9th Cir. 1977); Cullen v. U.S., 372 F.Supp. 441 (D.C. Ill. 1974); Beckerman v. Sands, 364 F.Supp. 1197 (D.C. N.Y. 1973).

Defendants' only retort to plaintiffs' showing of numerosity is that those women who completed the application process were not discriminated against. But that is not at issue at this point in the proceedings. As noted earlier, in ruling upon a motion for class certification, the Court is not empowered to conduct a mini-trial

on the merits of the case. East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395, 14 FEP Cases 1505 (1977). Its only job is to determine whether plaintiffs have satisfied the criteria of Rule 23. And with respect to numerosity, this Court has no doubt that plaintiffs' showing of some several hundred plaintiffs demonstrates that joinder is impracticable and a class action essential.

b. Commonality

Likewise, the Court is convinced that plaintiffs have met the commonality requirement of Rule 23(a)(2). That section provides that "questions of law or fact common to the class" must exist before the action can go forward on a class basis. It does not require that all questions of law and fact involved in the dispute be common to all members of the class. Martinez v. Bechtel Corp., 11 FEP Cases 898 (N.D. Cal. 1975).

In the absence of a more detailed statutory definition of commonality, Judge Schwarzer has provided in Harriss v. Pan American World Airways, 74 F.R.D. 24, 41, 15 FEP Cases 1640 (N.D. Cal. 1977), a list of pertinent criteria to consider:

(i) What is the nature of the unlawful employment practice charged – is it one that peculiarly affects only one or a few employees or is it genuinely one having a class-wide impact.

(ii) How uniform or diverse are the relevant employment practices of the employer, considering matters such as: size of the work force; number of plants and installations involved; extent of diversity of employment conditions, occupations and work activities; degree of geographic dispersion of the employees and of intra-company employee transfers and interchanges; degree of

decentralization of administration and supervision as opposed to the degree of local autonomy.

(iii) How uniform or diverse is the membership of the class, in terms of the likelihood that members' treatment will involve common questions.

(iv) What is the nature of the employer's management organization as it relates to the degree of centralization and uniformity of relevant employment and personnel policies and practices.

(v) What is the length of the time span covered by the allegations, as it relates to the degree of probability that similar conditions prevailed throughout the period.

Under the methodology proposed by Judge Schwarzer, there is little doubt that commonality exists. First, as plaintiffs point out in their reply brief, the nature of the alleged discrimination is one which affects not one or few employees, but instead, at least hundreds. Second, the alleged discriminatory impact is the product of a uniform recruitment, selection, and training procedure. Third, class membership is very homogeneous, consisting only of women who have applied, or were deterred from applying, for a single type of job. Fourth, the management structure which has determined and controlled the above employment practices is highly centralized and uniform, the procedure having been developed and overseen by corporate headquarters and regional vice-presidents. Fifth, the time period covered by the allegations is five years, and there has been no suggestion that during this period relevant employment practices varied.

The existence of common questions is clear according to not only Judge Schwarzer's formulation, but also others within use in this district. In Martinez v. Bechtel, 11 FEP Cases 898, 903 (N.D. Cal. 1975), for example,

Judge Williams found common questions based upon allegations of discrimination plus statistical evidence indicating that few women are employed by defendants in the position in question. Plaintiffs in the instant case have supplied both. Similarly, in Walthall v. Blue Shield of California, 16 FEP Cases 626, 628 (N.D. Cal. 1977), and Ellis v. Naval Air Rework Facility, 404 F.Supp. 391, 396, 13 FEP Cases 1782 (N.D. Cal. 1975), Judges Wollenberg and Orrick, respectively, held that Rule 23(a)(2) is satisfied by common discriminatory employment practices or the common threat of discrimination towards all members of the class. We have no doubt that plaintiffs' allegations that State Farm engages in a policy of sex discrimination in the recruitment and hiring of Trainee Agents in the State of California meet the standard enunciated in these cases as well.

In contrast, defendants' argument that commonality is lacking is unpersuasive. Defendants contend that no common questions are involved because decisions regarding the hiring and training of Trainee Agents are made individually by agency managers in different parts of the state and under diverse circumstances. Defendants' argument fails for several reasons. First, as suggested earlier, commonality does not require the existence of identical fact patterns with respect to every member of the class. Wright and Miller, Federal Practice and Procedure, §1763 at 603 (1969). Second, the fact that members of the class are spread out geographically is by no means fatal to commonality. As plaintiffs point out, certification of geographically broad classes is commonplace. See, e.g., Bernardi v. Bergland, 18 FEP Cases 1180 (N.D. Cal. 1977); Alaniz v. California Food Processors, Inc., 73 F.R.D. 269,

13 FEP Cases 720 (N.D. Cal. 1976). Finally, in view of plaintiffs' allegation that discrimination is company wide, any question as to whether discrimination against women is individually practiced or company policy is a question to the claims of the class. Martinez v. Bechtel, 11 FEP Cases at 903.

c. Typicality

In addition to numerosity and commonality, Rule 23 demands that plaintiffs demonstrate that their claims are typical of those of the members of the class. Fed.R.Civ.P. 23(a)(3). Plaintiffs have surmounted this hurdle, too.

Like its 23(a) counterparts, the typicality requirement has sometimes suffered from a lack of precision. The Supreme Court has stated merely that typicality is satisfied if class representatives " 'possess the same interest and suffer the same injury' as the class members." East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 14 FEP Cases 1505 (1977). Judge Renfrew added some much needed precision to this definition in Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 18 FEP Cases 1645, 1666 (N.D. Cal. 1978), in which he stated that typicality does not require plaintiffs' claims to be factually identical with those of the remaining class members, but simply that they "arise out of the same remedial and legal theory."

In the instant case, plaintiffs Kraszewski and Tipton allege that they were discouraged by defendant from applying for, and were denied, positions as Sales Agent Trainees, solely on the basis of their sex. For purposes of bringing a class action, their claims must be viewed as

typical of those of the proposed class who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as Sales Agent Trainees by State Farm within the State of California. The interests of these two plaintiffs and the members of the class are sufficiently parallel to foster the effective presentation of all potential claims for relief which Rule 23(a)(3) seeks to ensure. Wofford v. Safeway Store, Inc., 18 FEP Cases at 1666.

Whether typicality exists is not as easily resolved with respect to plaintiff Jackson. Unlike Kraszewski and Tipton, Jackson eventually obtained a position as a Sales Agent Trainee, although plaintiffs allege that originally she was discouraged from doing so. Because Jackson did apply, and gained an appointment, defendants assert that her claims cannot be considered typical of those of the proposed class. We disagree.

Defendants are correct in stating that Jackson's claim is not as closely aligned with members of the class as are those of the other plaintiffs; but that is not dispositive. Factual dissimilarities are not fatal to typicality when, as in the instant case, the representative's claim arises from the same course of conduct of legal theory as the claims of other class members. Smith v. B. & O. Railroad Co., 473 F.Supp. 572, 102 LRRM 2109 (D.C. Md. 1979). Nor do the authorities defendants cite prove otherwise. Robbins v. O'Brien Corp, 14 FEP Cases 934 (N.D. Cal. 1977) is distinguishable on its facts and Piva v. Xerox Corp., 70 F.R.D. 378, 11 FEP Cases 1259 (N.D. Cal. 1976), a case much like our own, supports rather than opposes a finding of typicality here.

In Piva, a former employee who had been discharged by defendant Xerox, sought to represent a class of past, present and future employees who have been, are being, or may in the future be discriminated against on the basis of sex in any of a number of ways, including recruiting and hiring. Piva v. Xerox Corp., 70 F.R.D. at 381-382. Like Jackson's claims, plaintiff Piva's were not identical with those of all members of the proposed class. Nonetheless, Judge Sweigert concluded that she had satisfied the prerequisite of typicality. Citing the importance of the broad remedial public policy of Title VII, as recognized by the Supreme Court and Congress, Judge Sweigert emphasized that the typicality requirement should be liberally construed in order to enable a Title VII plaintiff to "challenge employment practices which are related to but not indentical to the practices which directly affected the plaintiff individually." Piva v. Xerox Corp., 70 F.R.D. at 388. We share Judge Sweigert's reasoning and believe that it is wholly applicable to the situation of Plaintiff Jackson in the instant case.

d. Adequacy of Representation

The fourth and final condition of Rule 23(a) with which plaintiffs must comply is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This requirement of adequate representation is important because the judgment on the merits plaintiffs obtain will determine with finality the rights of numerous absent class members. See Hansberry v. Lee, 61 S.Ct. 115 (1940).

We are aware of no better statement of the ingredients which go into adequate representation than that espoused by Judge Medina in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968). In a well-reasoned discussion, Judge Medina numbered three factors as crucial: 1) competence of plaintiffs' counsel; 2) absence of collusion; and 3) absence of antagonistic interests between the representatives and remaining members of the class. Eisen v. Carlisle & Jacquelin, 391 F.2d at 562-563. We would add that the Ninth Circuit recently adopted much the same criteria. Social Services Union v. County, 609 F.2d 944, 21 FEP Cases 684, 685-686 (9th Cir. 1979).

A careful review of the record confirms that plaintiffs adhere to all three and, consequently, are adequate representatives. First, defendants do not dispute, and we are convinced, that plaintiffs' counsel have the necessary expertise and experience to prosecute this litigation. Second, defendants do not offer any evidence of, and we are aware of none, which would suggest the presence of collusion. Third, and finally, we have no reason to believe that the interests of the representative plaintiffs are in any way antagonistic to those of other members of the class. Defendants' contention that plaintiffs are unsatisfactory representatives because their interests in future job opportunities at State Farm are contrary to the interests of class members in the same jobs is novel, but unconvincing. As plaintiffs point out, defendants' claim is merely speculative, and therefore insufficient to demonstrate the type of actual conflict required by the Ninth Circuit before it will deny the existence of adequate representation. Social Services Union v. County, 21 FEP Cases at 687.

Furthermore, as plaintiffs also explain, were defendants' contention accepted, Title VII class certification motions would invariably fail because representative plaintiffs and class members always are in competition for a limited number of job openings.

For these reasons, we find that plaintiffs are adequate representatives of the proposed class, and as a result, that plaintiffs have met all of the conditions posed by Rule 23(a) for class certification.

IV. Class Certification is Warranted Under Rule 23(b)(2)

Having satisfied all of the prerequisites of Rule 23(a), plaintiffs must also pass the standard of Rule 23(b)(2). That is, they must demonstrate that

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . . Fed.R.Civ.P. 23(b)(2)

Plaintiffs have made such a showing.

As noted earlier, plaintiffs have brought this action on behalf of themselves and other women applicants for Sales Agent Trainee positions to challenge alleged sex discrimination by defendants in recruiting, hiring, assignment and training. They seek declaratory, injunctive, and monetary relief. As such, plaintiffs have alleged the two elements which Rule 23(b)(2) expressly requires: that defendants have acted in a manner "generally applicable to the class" and that injunctive or corresponding declaratory relief is sought as a remedy. Fed.R.Civ.P. 23(b)(2);

Wright and Miller, Federal Practice and Procedure, §1775 at 19; Doninger v Pacific Northwest Bell, Inc., 564 F.2d at 1313.

The fact that plaintiffs seek monetary relief in addition to an injunction and declaration does not prevent certification under Rule 23(b)(2). Although it is true that Rule 23(b)(2) is inapplicable when the relief sought is wholly or predominantly damages, McDonnell Douglas Corp. v. U.S. District Court, C.D. of Cal., 523 F.2d 1083 (9th Cir. 1975), Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 16 FEP Cases 316, it remains appropriate when the primary remedy is an injunction. Senter v. General Motors Corp., 532 F.2d 511, 12 FEP Cases 451 (6th Cir. 1976), cert. denied, 429 U.S. 870, 97 S.Ct. 182, 13 FEP Cases 963; Harriss v. Pan American World Airways, Inc., 74 F.R.D. at 46. In the instant case, no evidence has been presented beyond the bare assertion of defendants that would indicate that monetary relief is paramount. And the latter is insufficient reason for denying certification under Rule 23(b)(2).

V. Conclusion

Accordingly, this Court finds that plaintiffs have satisfied all of the requirements of Rules 23(a) and (b), and as a result may maintain this action as a class action on behalf of themselves and all other female applicants and deterred applicants who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as

Sales Agent Trainees by defendant companies within the State of California.

SO ORDERED.

KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C 79-1261 TEH, November 16, 1982

Full Text of Opinion

HENDERSON, District Judge: – On September 9, 1981, the Court provisionally certified the above-captioned action as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2). Defendants have moved the Court for reconsideration of the class certification, in light of the recent decision in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 28 FEP Cases 1745 (1982) [hereinafter referred to as "Falcon"]. The Court having considered the papers filed by both parties, and good cause appearing, for the reasons hereinafter stated,

IT IS HEREBY ORDERED that defendants' motion is denied.

STATEMENT OF THE FACTS

Plaintiffs Muriel E. Kraszewski, Daisy O. Jackson and Wilda Tipton bring this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, against defendants State Farm General Insurance Company, State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company, and State Farm Fire and Casualty Company [hereinafter "State Farm"].

Plaintiffs allege that defendants have discriminated on the basis of sex in the recruitment, hiring and training of State Farm Sales Agent Trainees in the State of California. Accordingly, plaintiffs sue on behalf of themselves and other women applicants and deterred applicants seeking this job.

All three individual plaintiffs allege that defendants discouraged them from applying for the job of Sales Agent Trainee. In spite of this alleged discouragement, all three applied. Plaintiffs Kraszewski and Tipton were unsuccessful applicants; plaintiff Jackson was a successful applicant, but was unsuccessful in her attempt to graduate from the job of Trainee Agent to that of Career Sales Agent.

The class provisionally certified by the Court and represented by the three individual plaintiffs includes:

all female applicants and deterred applicants who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as Sales Agent Trainee by defendants within the State of California.

Thus far, after 46 days of trial, the Court has heard both statistical and anecdotal evidence regarding the alleged disparate treatment of and impact on women of State Farm's recruiting, hiring and training practices. The statistical evidence has been relevant both to the individual plaintiffs' claims and to the class claims. Likewise, the anecdotal evidence has been relevant both to the individual plaintiffs' claims and to the class claims.

LEGAL STANDARD

The full discussion of the requirements of Rule 23(a) which appears in the Court's September 9, 1981 Order provisionally certifying the class in this case, Kraszewski v. State Farm Ins. Co., 27 Fair Empl. Prac. Cas. (BNA) 27 (1982) is hereby incorporated by reference. In brief, the Rule 23(a) requirements are: numerosity, commonality, typicality, and adequacy of representation.

Application of Standard To Facts

Defendants challenge the commonality and typicality of the individual plaintiffs in this action. As the Supreme Court has observed, the commonality and typicality requirements tend to merge, since the primary purpose of Rule 23(a) is to determine

> whether the individual plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and *adequately protected* in their absence.

Falcon, 102 S.Ct. at 2371 n. 13 (emphasis added); See Kraszewski, 27 Fair Empl. Prac. Cas. (BNA) at 31. Thus the key question under Rule 23(a) is *adequate representation*: do the named plaintiffs have sufficient commonality and typicality to ensure that he absent class members receive, albeit by proxy, their fair day in court?

Defendants contend that the individual plaintiffs' claims in this case are not sufficiently related to those of the class to ensure adequate protection of the absent class members. In particular, defendants contend that, under Falcon, none of the individual plaintiffs can adequately protect the interests of "deterred applicants," since all

three individual plaintiffs formally applied for the job of Sales Agent Trainee. We disagree.

In Falcon, an individual employee alleging discriminatory treatment in promotion with respect to a single job position purported to represent both employees and rejected applicants suffering discriminatory impact in promotions and in hiring for all jobs in defendant's control. Proof of the individual claim involved anecdotal evidence only while proof of the class claims involved statistical evidence only. Falcon, 102 S.Ct. at 2372. The Supreme Court held that, on those facts, automatic certification of an "across-the-board" class without any "specific presentation" identifying the questions of law or fact common to the individual claim and the class claims was improper because there was no showing of commonality and typicality as required by Rule 23(a). Falcon, 102 S.Ct. at 2371.

Falcon is factually distinguishable from the present case on at least three grounds. *First*, this is not an "across-the-board" case: whereas plaintiff in Falcon sought to certify a class for all job positions controlled by defendant, plaintiffs in this case seek certification of a class for only one job position – Sales Agent Trainee. *Second*, the types of evidence required to prove the individual and the class claims in this case are interrelated: whereas Falcon involved a clear delineation between the individual's anecdotally-proven disparate treatment case and the class's statistically-proven disparate impact case, plaintiffs in this case are using a mix of anecdotal and statistical evidence with respect to both disparate treatment and disparate impact to prove both the individual and class claims. Third, the locations of the discrimination alleged

in this case are much more closely related than those alleged in Falcon: whereas Falcon involved a loose mix of discrimination in promotion and discrimination in hiring, plaintiffs in this case allege discrimination in three interrelated steps on the way to becoming a Career Sales Agent – recruiting, hiring, and training.

More importantly, even if Falcon were not distinguishable on its facts, the class certification in this case is entirely consistent with the holding of Falcon regarding the commonality and typicality requirements. As the Supreme Court in Falcon expressly noted:

> If [an employer] use[s] a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test would clearly satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes.

Falcon, 102 S.Ct. at 2372 n. 15. In this case, a class which includes deterred applicants, unsuccessful applicants and employees is justified by the named plaintiffs' allegations of a general policy of discrimination manifested in entirely subjective decision-making processes in hiring and promotion practices. Moreover, the Court did not rely merely upon plaintiffs' allegations in certifying a class; provisional certification did not issue until after a "specific presentation" of documentary materials from plaintiffs identifying the common questions of law and fact among the individual claims and the class claims.

And at this point, after 46 days of trial, the Court is satisfied that the provisional certification was appropriate, because the vast bulk of evidence relevant to the individual claims has also been relevant to the class claims. Accordingly, defendants' motion must be denied.

KRASZEWSKI V. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C 79-1261 TEH, June 9, 1983

Full Text of Opinion

HENDERSON, District Judge: – The discovery process in the above-captioned case was unusually protracted and dispute-ridden. Plaintiffs were required to obtain nine separate Orders Compelling Discovery, and the Court was required to hold special monthly discovery conferences to manage the litigation. After all this work before trial, the Court was dismayed to find on May 11, 1982 that a mid-trial recess was required to allow plaintiffs to gather information which defendants through their counsel should have provided during the discovery and pre-trial phases of the litigation. Accordingly, in our May 11, 1982 Order Regarding Defendants' Noncompliance with Discovery Orders, the Court reviewed defendants' abuses of discovery in connection with two earlier Orders Compelling Discovery – those of January 18, 1982 and February 12, 1982 – and then referred to the Magistrate the question of sanctions both for defendants' noncompliance with all three court orders and for defendants' failure to respond to the legitimate discovery requests underlying those orders.

This reference to the Magistrate of the sanctions question proved premature. Upon resuming trial after the information-gathering recess, the Court faced a series of evidentiary motions from plaintiffs seeking to exclude

various portions of defendants' evidence because of defendants' alleged noncompliance with the Court's earlier discovery and pretrail Orders. Mid-trial resolution of these matters appeared impractical. Accordingly, on August 5, 1982, the Court ordered "all pending evidentiary motions based on alleged violations of discovery orders" – and the sanctions questions implicit therein – referred to Special Master Professor Mary Kay Kane of the Hastings School of Law for full review, and for a report and recommendation regarding their disposition. In so referring the sanctions questions implicit in these motions, the Court effectively stayed consideration by the Magistrate of the earlier sanctions question referred to him, as no ruling has been entered nor has argument even been heard in this matter by the Magistrate.

In their briefs to the Special Master, the parties identified four pending evidentiary motions based on alleged violations of discovery orders:

(1) plaintiffs' July 24, 1982 motion to exclude the testimony of defense witnesses Hooker, Hunt and Smith due to defendants' failure through their counsel to produce prior to trial the Aptitude Index Battery Cards ["AIB Cards"] and declarations of Understanding maintained in defendants' California Regional offices;

(2) plaintiffs' July 24, 1982 motion to exclude the testimony of defense witnesses Hooker, Hunt and Smith due to defendants' failure through their counsel to produce prior to the discovery cut-off date the computerized list by name of minority and women AIB test-takers who took that test prior to April 19, 1978;

(3) plaintiffs' June 25, 1982 motion to exclude the report of defense witness Elizabeth Milrod due to defendants' failure through their counsel to list and produce the Milrod report in a timely fashion and in compliance with court orders;

(4) plaintiffs' June 8, 1982 motion to exclude the handwritten memorandum of defense witness Matt Madsen – Trial Exhibit 74 – due to defendants' failure through their counsel to list that memo as an exhibit prior to trial and in compliance with court orders. In addition, both parties briefed for the Special Master another matter, not strictly within the terms of our August 5, 1982 Order of Reference, but nonetheless substantially related to the alleged discovery abuses at issue:

(5) plaintiffs' objection to defendants' failure through their counsel to produce during discovery the gross and net compensation figures which ultimately formed the basis of defendants' Trial Exhibit 131.2, which failure precluded plaintiffs from moving to strike Trial Exhibit 131.2 because it was the only available source at trial of the data needed by both sides.

Each party submitted over 40 pages of briefs and literally hundreds of pages of exhibits to the Special Master with reference to the five disputes listed above. On October 1, 1982 the Special Master submitted her report and recommendations, which are attached to this Order as "Exhibit A." The Court has found this report extremely helpful in resolving these difficult disputes, and warmly thanks the Special Master for her efforts.

On February 1, 1983, the Court served the parties with the Special Master's report, and gave the parties the

opportunity to respond in writing to that report. Both parties having done so, and the Court having now considered those brief, as well as the briefs and exhibits submitted to the Special Master, and having studied carefully the Special Master's recommendations, the Court enters the following Findings of Fact and Conclusions of Law with respect to the five disputes listed above. In addition, the Court notes that the factual questions underlying these five disputes are virtually identical to the factual questions underlying the earlier sanctions question referred to the Magistrate, and hence in the interest of judicial economy the Court vacates the earlier referral of this question to the Magistrate and enters Findings of Fact and Conclusions of Law with respect to that sanctions question as well.

FINDINGS OF FACT

A. *Re: the AIB Cards and Declarations of Understanding.*

(1) Plaintiffs' request in December 1980 for production of "all applications for employment" did not constitute a clear and specific request that necessarily should have resulted in defendants' production to plaintiffs of the Aptitude Index Battery Cards and Declarations of Understanding maintained in the defendants' California regional offices.

(2) Plaintiffs' Interrogatories 14 and 15 propounded in June 1981 and requesting all underlying documents or writings relating to potential applications for employment did constitute a clear, specific and timely request

that should have resulted in defendants' timely production to plaintiffs of the AIB Cards and the Declarations of Understanding.

(3) This Court's Discovery Conference Order Of October 9, 1981 disposed of defendants' objections to Interrogatories 14 and 15, and required defendants to produce by October 29, 1981 "all applications for employment within the State of California since January 1, 1970, including all formal or informal applications, inquires, and/or solicitations regarding possible employment as a sales agent or a Sales Agent Trainee." This Court Order – even more clearly than plaintiffs' Interrogatories – should have resulted in defendants' timely production to plaintiffs of the AIB Cards and Declarations of Understanding.

(4) This Court's Discovery Conference Order of February 12, 1982 again compelled defendants to answer Interrogatories 14 and 15, this time by February 26, 1982. This Court Order also should have resulted in defendants' timely production to plaintiffs of the AIB Cards and Declarations of Understanding.

(5) Defendants through their counsel failed to make a good faith effort to search the various corporate files or to inquire of key employees to verify their counsel's erroneous assumptions regarding record-keeping, and thereby failed to produce to plaintiffs prior to trial the AIB Cards and Declarations of Understanding.

(6) Defendants' failure through their counsel to make a good faith search and to produce to plaintiffs prior to trial the AIB Cards and Declarations of Understanding constituted a violation of this Court's Discovery

Conference Orders of October 9, 1981 and February 12, 1982.

(7) Defendants did not produce to plaintiffs the AIB Cards or Declarations of Understanding until May 1982, after the fourth week of trial. This production was not a timely response to plaintiffs' June 1981 Interrogatories, nor was it timely compliance with this Court's Discovery Conference Orders of October 9, 1981 and February 12, 1982.

(8) Defendants' tardy production of the AIB Cards and Declarations of Understanding caused plaintiffs substantial actual prejudice, by seriously undercutting plaintiffs' ability and efforts to identify and locate other class members. Defendants' eventual mid-trial production did not cure the prejudice to plaintiff, because during the long delay – nearly eleven months from plaintiffs' June 1981 interrogatories until defendants' May 1982 production – many class members relocated, thereby impeding and in some cases perhaps altogether precluding plaintiffs from locating those class members.

(9) Defendants' tardy production of the AIB Cards and Declarations of Understanding did not prejudice plaintiffs' ability to prepare cross-examination of defense witnesses Hooker, Hunt and Smith, because those witnesses did not testify until June 1982.

B. *Re: Computer List by name of Women and Minority AIB test-takers.*

(10) Throughout this litigation, defendants maintained a special subset of the general computer file

E.GSS.APHDATA, which contained data *by name* on women and minority AIB test-takers who took the test prior to April 19, 1978.

(11) On January 23, 1981, defendants' counsel filed, on behalf of defendants, the Supplemental Affidavit of Dr. Wayne W. Sorenson, which stated, at p. 4, ¶ 11, "I have . . . reviewed the AIB files by name. . . . "

(12) Plaintiffs' Interrogatory 15 propounded in June 1981 and requesting all names and addresses of AIB test-takers should have resulted in defendants' production to plaintiffs of the special computerized list by name of women and minority AIB test-takers who took the test prior to April 19, 1978.

(13) This Court's Discovery Conference Order of October 9, 1981 disposed of defendants' objections to Interrogatory 15, and clearly required defendants to produce by October 29, 1981 the "names, addresses and phone numbers of State Farm . . . applicants for employment . . . contained in the E.GSS.APHDATA . . . computer files . . . in machine-readable form [wherever possible]." This Court Order should have resulted in defendants' timely production to plaintiffs of the computerized list by name of women and minority AIB test-takers who took the test prior to April 19, 1978.

(14) This Court's Discovery Conference Order of February 12, 1982 again compelled defendants to answer Interrogatory 15, this time by February 26, 1982. This Court Order also should have resulted in defendants' timely production to plaintiffs of the computerized list by name of women and minority AIB test-takers who took the test prior to April 19, 1978.

(15) Defendants through their counsel failed to make a good faith effort to search the various computer files for a computerized listing by name of women and minority AIB test-takers, and further failed to inquire of key employees, such as Dr. Sorenson, whether such computerized listing existed or just how it was that Dr. Sorenson had reviewed AIB files by name. Instead, defendants through their counsel blithely maintained until March 1982 that no computerized records of AIB test-takers by name existed.

(16) Defendants' failure through their counsel to make a good faith search and to produce to plaintiffs the computerized listing by name of women and minority AIB test-takers within the time-frames contemplated by the Court Orders constituted a violation of this Court's Discovery Conference Orders of October 9, 1981 and February 12, 1982.

(17) Defendants did not produce the computerized listing by name of women and minority AIB test-takers who took the test prior to April 19, 1978 until March 1982, after the discovery cut-off date. This tardy production was not a timely response to plaintiffs' June 1981 Interrogatory, nor was it timely compliance with this Court's Discovery Orders of October 9, 1981 and February 12, 1982.

(18) Defendants' tardy production of the computerized listing by name of women and minority AIB test-takers caused plaintiffs substantial actual prejudice, by seriously undercutting plaintiffs' ability and efforts to identify and locate other class members. Defendants'

eventual March 1982 production did not cure the prejudice to plaintiffs, because during the long delay – roughly nine months – many class members relocated, thereby impeding and in some cases perhaps altogether precluding plaintiffs from locating those class members.

C. *Re: The Testimony, Testimony Summary, and Expert Report of Elizabeth Milrod.*

(19) Local Rule 235-7(i) requires that pretrial statements include a "list of all witnesses likely to be called at trial, except for impeachment or rebuttal, together with a brief statement following each name describing the substance of the testimony to be given."

(20) Local Rule 235-7(j) requires that pretrial statements include a "list of all documents and other items to be offered as exhibits at trial, except for impeachment or rebuttal, with a brief statement following each describing its substance or purpose. . . . "

(21) Defendants through their counsel filed a pretrial statement on February 26, 1982 which failed to list Mrs. Elizabeth Milrod as a witness – thereby, of course, failing also to indicate what the substance of her testimony would be – and failed to list any report prepared by Mrs. Milrod as a trial exhibit.

(22) The deposition testimony provided by Mrs. Milrod at her March 1, 1982 deposition did not adequately provide plaintiffs with "the substance of the facts and opinions to which [this] expert [was] expected to testify and a summary of the grounds for each opinion," as required by Fed. R. Civ. P. 26(b)(4)(A)(1), because Mrs.

Milrod indicated that she had not then examined the facts of this case or formed any opinions on most matters at issue.

(23) This Court's Order Concerning Pretrial Motions of March 10, 1982 clearly required defendants to comply with Local Rule 235-7 and file no later than March 19, 1982 a "list of all documents and other items to be offered as exhibits at trial, except for impeachment or rebuttal, together with a brief statement following each describing its substance or purpose." This Order also cautioned that "[a]ny items or documents not filed as ordered shall be inadmissible at trial." This Order should have resulted in the listing of the report of Elizabeth Milrod no later than March 19, 1982, if defendants wanted to introduce such report at trial for purposes other than impeachment or rebuttal.

(24) On March 18, 1982, defendants through their counsel listed Mrs. Milrod as a witness likely to be called at trial, but the accompanying statement purporting to describe the substance of her testimony did not adequately provide plaintiffs with "the substance of the facts and opinions to which [this] expert [was] to testify and a summary of the grounds for each opinion," because the accompanying statement merely indicated in an extremely general way the type of data Mrs. Milrod would present without indicating what her opinions regarding this case were or even how the data to be presented would relate to the case.

(25) The deposition testimony provided by Mrs. Milrod at her April 23, 1982 deposition did adequately provide plaintiffs with "the substance of the facts and

opinions to which [this] expert [was] expected to testify and a summary of the grounds for each opinion," because she did review substantially all of the documentary evidence upon which she eventually would rely and also conveyed her essential opinions regarding most of the matters at issue in this case.

(26) The report prepared by Mrs. Milrod and first presented on June 25, 1982 was never listed by defendants as an exhibit for trial.

(27) The report prepared by Mrs. Milrod and first presented on June 25, 1982 did not constitute "impeachment or rebuttal."

(28) Plaintiffs did not suffer actual prejudice from the trial testimony of Elizabeth Milrod in June 1982, because the March 1982 notification that she would be testifying, combined with the April 1982 notification of the substance of her testimony through her deposition, provided plaintiffs sufficient time adequately to prepare for effective cross-examination of Mrs. Milrod's oral testimony. This finding in no way condones or excuses defendants' bad faith failure through their counsel to comply with the Court's Pre-trial Order and the Local Rules.

(29) Plaintiffs would suffer actual prejudice from the admission into evidence of the report of Elizabeth Milrod, because the June 25, 1982 presentation of that report was too late to provide plaintiffs adequate time to prepare for effective cross-examination and rebuttal of the substance of Mrs. Milrod's report.

D. *Re: Trial Exhibit 74 – the Handwritten Memo of Agency Manager Matt Madsen Regarding his Meeting with Muriel Kraszewski.*

(30) Plaintiffs' Interrogatories 13-17 propounded in June 1981 should have 6resulted in the production of the handwritten memo of Agency Manager Matt Madsen regarding his meeting with Muriel Kraszewski [hereinafter "the Madsen memo"].

(31) Defendants' responses of September 1981 to those interrogatories indicated that they knew of no such memo.

(32) Based on the Court's assessment of the credibility of plaintiffs' counsel Ruby S. Udell, and based on the absence of any proper affidavit from defendants or their counsel refuting Ms. Udell's testimony regarding the Madsen memo the Court finds that defendants did not produce the handwritten Madsen memo to plaintiffs at any time prior to the discovery cutoff date.

(33) This Court's Order Concerning Pretrial Motions of March 10, 1983 clearly required defendants to comply with Local Rule 235-7(j) regarding the listing of all trial exhibits no later than March 19, 1983. This Order should have resulted in the listing of the Madsen memo, if defendants wanted to introduce such memo at trial for purposes other than impeachment or rebuttal.

(34) Defendants through their counsel did not list the Madsen memo as a Trial Exhibit.

(35) Defendants first produced the Madsen memo at trial, as Trial Exhibit 74.

(36) Plaintiffs would suffer actual prejudice from the admission into evidence of the Madsen memo, because the production at trial was too late to provide plaintiffs sufficient time to prepare for effective cross-examination and rebuttal of the substance of that memo.

E. *Re: Trial Exhibit 131.2 – Records of Net and Gross Compensation for Trainee and Sales Agents.*

(37) Plaintiffs' Interrogatories 12 and 13 propounded in September 1981 should have resulted in defendants' production of gross and net compensation figures for State Farm Sales Agent Trainees and Sales Agents.

(38) Defendants through their counsel did not produce the gross and net compensation figures for Trainee and Sales Agents, but instead responded in September 1981 that the terms "gross and net compensation" were meaningless or – in the alternative – that the information requested was not discoverable because it related to settlement discussions.

(39) The terms "gross and net compensation" in this context evidently gained meaning for defendants and their counsel by January 1982, in light of defendants' counsel's preparation of Trial Exhibit 131.2 – a detailed summary of gross and net compensation for State Farm Sales Agent Trainees and Sales Agents during the periods at issue in this litigation.

(40) Defendants through their counsel failed to provide to plaintiffs at any time prior to the discovery cutoff

date the requested information regarding gross and net compensation figures for Trainee and Sales Agents.

(41) The gross and net compensation figures for Trainee and Sales Agents were properly and subject of discovery, and defendants' argument that the information "related to settlement discussions" was and is frivolous and wholly without merit. Indeed, defendants' argument is merely another instance of defendants' lack of good faith in complying with the legitimate discovery requests of plaintiffs and the discovery orders of this Court.

(42) On June 8, 1982, the Court ordered defendants to produce to plaintiffs the data regarding gross and net compensation of State Farm Trainee and Sales Agents.

(43) Even assuming that defendants did finally produce the data in response to the Court's June 8, 1982 Order, such mid-trial production was an untimely response to plaintiffs' request and effectively precluded plaintiffs from assembling the data into an exhibit of their own for trial.

(44) Plaintiffs' stipulation at trial to the admissibility of Trial Exhibit 131.2 was a direct result of defendants' failure to produce the underlying information to plaintiffs during discovery, and hence did not constitute a waiver of their right to seek sanctions against defendants on this point.

(45) Plaintiffs suffered substantial actual prejudice from defendants' failure to produce the information regarding gross and net compensation figures for Trainee and Sales Agents, because plaintiffs were forced to make do with Trial Exhibit 131.2 and were precluded from

preparing their own version of the same information, highlighting that part of the data which was favorable to their own case rather than to defendants' case.

F. *Re: The Pending Sanctions Issues from the three Orders to Compel, Previously Referred to the Magistrate.*

(46) Defendants' September 1981 objections to 59 of plaintiffs 73 Interrogatories propounded in June 1981 were dilatory, frivolous and wholly lacking in substantial justification. The defendants' basic position with respect to 40 of the 59 unanswered interrogatories – that defendants would not answer the questions until plaintiffs produced "credible evidence" to support the allegations underlying the questions – was recognizable as an absurdity to anyone even passingly familiar with the American discovery process. See Scovill Manufacturing Co. v. Sunbeam Corp., 61 F.R.D. 598 (D. Del. 1973).

(47) Defendants' dilatory and frivolous objections to plaintiffs' June 1981 Interrogatories forced plaintiffs to obtain the January 18, 1982 Order Compelling Discovery.

(48) Defendants' objections to plaintiffs' September 1981 Interrogatories were also dilatory, frivolous and wholly lacking in substantial justification. Again, defendants' position – that no specific responses were required because the information was equally available to plaintiffs in unspecified masses of deposition testimony and company records – was facially inconsistent with the American discovery process. See In Re Master Key, 15 F.R. Serv.2d 742 (D. Conn. 1971).

(49) Defendants' dilatory, frivolous and unjustified objections to plaintiffs' September 1981 Interrogatories forced plaintiffs to obtain the February 12, 1982 Order Compelling Responses.

(50) Defendants' position with respect to the disputes discussed in the May 11, 1982 Order Regarding Defendants' Noncompliance with Discovery Orders also wholly lacked substantial justification. The lengthy findings recited in the May 11, 1982 Order are hereby adopted and incorporated by reference as if fully set forth herein.

(51) The sanctions issues referred to the Magistrate on May 11, 1982 for disposition have in fact never been ruled on, and are not now on the Magistrate's calendar.

G. *GENERAL FINDINGS RE: Sections A-F Above.*

(52) With respect to each of the failures and discovery abuses of defendants detailed in sections A-F supra, the Court is satisfied that defendants' counsel had control over the circumstances surrounding those failures and abuses and hence bears by far the greatest share of responsibility for those failures and abuses.

(53) To the extent that any of the following Conclusions of Law are deemed to be Findings of Fact, they are incorporated herein.

CONCLUSIONS OF LAW

(54) To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein.

A. *LEGAL STANDARDS RE: Sanctions.*

(55) With respect to defendants' and their attorneys' failure to obey Court Orders regarding discovery, this Court has authority to "make such orders in regard to the failure as are just." Fed. R. Civ. P. 37(b)(2). These orders may include, but are not limited to, orders establishing designated facts as established, orders striking designated testimony or exhibits, and orders "treating as contempt of court the failure to obey [the discovery orders]." Id.

(56) With respect to defendants' and their attorneys' failure to obey Court Orders regarding discovery, this Court has additional authority to "require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified. . . . " Id.

(57) With respect to defendants' and their attorneys' evasion of legitimate discovery requests through false responses that the information or documents sought did not exist, this Court's "inherent power" to manage its own cases gives it authority to burden the deviant party with sanctions up to and including dismissal of the entire case. See Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962); Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264, 268 (1979).

(58) With respect to defendants' and their attorneys' conduct which necessitated the plaintiffs' many motions to compel discovery, this Court is obligated to "require the party . . . whose conduct necessitated the motion or the . . . attorney advising such conduct or both of them to

pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the Court finds that the opposition to the motion was substantially justified. . . . " Fed. R. Civ. P. 37(a)(4).

(59) The normal sanctions rule followed by federal courts is that the proper sanction must be no more severe than is necessary to prevent prejudice to the victimized party. Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 504 (4th Cir. 1977), quoting Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1127 (5th Cir. 1970), cert. denied sub nom. Trefina v. United States, 400 U.S. 878 (1970).

(60) In cases where the party to be sanctioned has acted in "flagrant bad faith" and its counsel have "callous[ly] disregard[ed] their responsibilities," more extreme sanctions than mere prevention of prejudice to the victimized party are warranted. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam); G-K Properties v. Redevelopment Agency, Etc., 577 F.2d 645, 647 (9th Cir. 1978). The purpose of the more extreme sanctions in these cases of egregious discovery abuses is both to penalize the offending party and its counsel and to deter such conduct by other parties in other cases in other courts. National Hockey League, 427 U.S. at 643; G-K Properties, 577 F.2d at 648; Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264, 275 (1979).

(61) Eventual but nonetheless tardy compliance with Court Orders and with legitimate discovery requests does not excuse discovery abuse, nor does it preclude imposition of sanctions. State of Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374 (10th Cir. 1978). Otherwise,

parties would be free to flout their obligations until a trial court utterly loses patience with them, and thereby embroil trial judges in day-to-day supervision of discovery. Dellums v. Powell, 566 F.2d 231, 235, 36 (D.C. Cir. 1977).

(62) Where appropriate, sanctions for discovery abuse should be imposed on attorneys rather than on their clients. See Associated Radio Service Co. v. Page Airways, Inc., 73 F.R.D. 633, 636-37 (N.D. Tex. 1977); Fed. R. Civ. P. 37; Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264, 273 (1977).

(63) In imposing particular sanctions, a trial court should be careful to explain why it has chosen one form of sanction rather than another. Wilson v. Volkswagen of America, Inc., 561 F.2d at 516.

B. *APPLICATION OF LEGAL STANDARDS TO THE INSTANT CASE.*

1. *Re: The AIB Cards and Declarations of Understanding.*

(64) In the context of the overall pattern of discovery abuse described in the Findings of Fact set forth above, defendants' disregard through their attorneys of two Court Orders and a very clear discovery request from plaintiffs constituted "flagrant bad faith" and "callous disregard for their responsibilities" both to plaintiffs and to this Court. See National Hockey League, 427 U.S. at 643.

(65) Since the Court wishes wherever possible to avoid fashioning a sanction which distorts the outcome of

the case by excluding relevant evidence or testimony, and since plaintiffs did not suffer actual prejudice in their ability to prepare cross-examination of defense witnesses Hunt, Hooker and Smith, the Court denies plaintiffs' motion to strike those three witnesses' testimony.

(66) Since plaintiffs have orally withdrawn their motion to reopen discovery based on the late production of the AIB Cards and Declarations of Understanding, and since reopening discovery would only serve to further delay in already needlessly protracted litigation, the Court rejects the possibility of sanctioning defendants by reopening discovery.

(67) Since plaintiffs' proposal that defendants pay the cost of a remedial notice to newly-discovered class members appears arbitrary, in that the cost of such notice is unrelated to the cost of remedying the actual harm suffered by the plaintiffs, the Court rejects this proposal.

(68) Rather, the appropriate sanction in this case to compensate plaintiffs for the harm caused by defendants' and their attorneys' misconduct is an Order "treating as contempt of court the failure to obey discovery orders." Fed. R. Civ. P. 37(b)(2). The specific sanctions imposed on defendants and their attorneys for their contemptuous conduct shall depend upon the outcome of this litigation on the merits. Should defendants prevail on the merits, the actual prejudice suffered by plaintiffs in lost opportunities to locate class members will be harmless, and the only appropriate compensatory sanction within this Court's civil contempt power will be an Order directing defendants and their attorneys to pay plaintiffs' reasonable attorneys' fees and costs in obtaining the two Court

orders of October 9, 1981 and February 12, 1982. Fed. R. Civ. P. 37(b)(2). However, should plaintiffs prevail on the merits, the actual prejudice suffered by plaintiffs in lost opportunities to locate class members will be quite substantial. In this event, the appropriate compensatory sanction within this Court's civil contempt power will be threefold: (1) an Order directing defendants and their attorneys to pay plaintiffs' reasonable attorneys' fees and costs in obtaining the two Court orders of October 9, 1981 and February 12, 1982 – which fees and costs would of course be recoverable independent of the dictates of Rule 37, since this is a civil rights case; (2) an Order directing that defendants and their attorneys shall pay plaintiffs' reasonable attorneys' fees and costs in attempting to locate any class members whose names appear on the AIB Cards, Declarations of Understanding or the Computerized Listing and whose address is not presently known to plaintiffs, such location attempts to be effected by any or all of the following means: (i) the use of professional name-tracing investigatory agencies; (ii) the use of the questionnaire to defendants' agents suggested at page 8 of the plaintiffs' brief to this Court; (iii) the use of any other method reasonably calculated to locate missing class members; (3) an Order directing that defendants and their attorneys shall hold open for class members not located within one year by the above-described means a fluid recovery fund, to which class members located at any time until January 1, 1990 can apply for recovery of damages based on membership in the class.

(69) Should plaintiffs prevail on the merits, the second and third Orders described in ¶(68) above shall be

implemented as follows: (a) defendants and their attorneys shall pay to plaintiffs' attorneys not later than 30 days from the date of the Court's judgment in this case the sum of $50,000, which sum plaintiffs' attorneys shall deposit in an interest-bearing account to be used for one year from the date of the Court's judgment to pay for the fees and costs incurred in attempting to locate the missing class members; at the conclusion of one year from the date of judgment, plaintiffs' attorneys shall submit to the Court a bill for the fees and costs actually incurred in the location efforts, and after approval by the Court, shall either refund to defendants and their attorneys the amount by which the account balance (including interest) exceeds the approved fees and costs, or shall be reimbursed by defendants and their attorneys for the amount by which the approved fees and costs exceed the amount available from the account (including interest); (b) defendants and their attorneys shall pay to plaintiffs' attorneys not later than 360 days from the date of the Court's judgment in this case the sum of $250,000.00, which sum plaintiffs' attorneys shall deposit in another interest-bearing account to be used until January 1, 1990 for the payment of any Court-approved recoveries to class members located after the ordinary period for the payment of judgment has lapsed. The sum described in subparagraph (a) above shall be shared equally between defendants and defendants' attorneys, but the sum described in subparagraph (b) shall be borne entirely by defendants.

(70) The purpose of the sanctions described in ¶¶(68)-(69) is remedial – i.e., to compensate plaintiffs for the interference with their rights to send individual notice to all class members, see, e.g., Oppenheimer Fund,

Inc. v. Sanders, 437 U.S. 340 (1978), which was caused by defendants' tardy production through their counsel of the AIB Cards and Declarations of Understanding.

(71) Although there is strong evidence in this case of "wilful disobedience" of court orders by defendants and their counsel which might have warranted a finding of criminal contempt, see Falstaff Brewing Corp. v. Miller Brewing Co., No. 81-4214, slip op. at 1311 (9th Cir. March 28, 1983) [hereinafter "Falstaff"]; Chapman v. Pacific Telephone & Telegraph Co., 613 F.2d 193, 195 (9th Cir. 1979), the Court's sole purpose in designing the sanctions described in ¶¶(68)-(69) is to compensate the plaintiffs for injuries suffered because of defendants' noncompliance through their attorneys with court orders, and hence the sanctions constitute civil rather than criminal contempt, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); Falstaff, No. 81-4214, slip op. at 1305; United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980).

(72) While civil contempt may have an incidental effect of vindicating the Court's authority, such incidental effect does not change the primary purpose or nature of the civil contempt order. Gompers, 221 U.S. at 443; Falstaff, No. 81-4214, slip op. at 1305.

(73) Because the civil contempt sanction described above does not involve dismissal or preclusion of evidence which might affect the merits of the case, the extensive briefing and hearing opportunities afforded defendants and their counsel on this matter have provided them with due process. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 n.14, 23 FEP Cases 12 (1980);

Societe Internationale v. Rogers, 357 U.S. 197, 208-212 (1958); Falstaff, No. 81-4214, slip op. at 1311 n.9.

(74) Sanctions against both defendants and their attorneys are appropriate under Fed. R. Civ. P. 37(b)(2). In this case, an order requiring defendants and their counsel to share equally the sanctions described in ¶(69)(a) above is fair because, while the Court is persuaded that defendants' counsel played a leading role in devising the strategy of noncompliance with court orders used in this case, the Court recognizes that defendants freely chose their counsel and very likely endorsed the strategy of noncompliance. See Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264, 273 (1977). To the extent that defendants may be unwitting victims of their attorneys' misconduct, they can recover damages for any injury sustained because of that misconduct in a tort action for legal malpractice against those attorneys. Id. at 274. Similarly, an order requiring defendants alone to pay the sanctions described in ¶(69)(b) above is fair, because this sanction is intertwined with the ultimate remedy in the case.

(75) Finally, the Court notes with no little frustration that, given the facts of this case, most of the sanctions available to us do little to serve the deterrent effect contemplated by the Supreme Court in National Hockey League, 427 U.S. 639 (1976) (per curiam). Defendants and their counsel in this case evidently decided to take a "sporting chance" by ignoring legitimate discovery requests and violating Court Orders: if the abuse went uncaught and plaintiffs prevailed, defendants figured to reap substantial benefits in unpaid claims by their successful frustration of plaintiffs' attorneys' attempts to

locate class members; and even if the abuse was caught, defendants figured to get off fairly lightly if plaintiff prevailed on the merits, since this is a civil rights action in which plaintiffs would receive attorneys' fees anyway, and get off extremely lightly if defendants prevailed on the merits, since there would be little other than attorneys' fees for which plaintiffs could be compensated. Under these circumstances, the Court has labored long in attempting to devise sanctions which would deter defendants and their attorneys from taking such a "sporting chance" in the future, without exceeding the limits of our compensatory civil contempt power. Unfortunately, we must concede that the sanctions which will take effect should defendants prevail on the merits will have no real deterrent effect on defendants and their attorneys at all, and we can only note our regret that the sanctions available to us are as limited as they are. At the very least, we hope that the sanctions which will take effect should plaintiffs prevail will have a significant deterrent effect, both on defendants and their attorneys in this case, and on other potential discovery abusers in other cases in other courts. See National Hockey League, 427 U.S. at 643.

2. *Re: The Computer List by Name of Women and Minority AIB test-takers.*

(76) Since the prejudice to plaintiffs caused by the tardy production of the computerized list is basically the same as the prejudice caused by the tardy production of the AIB Cards and Declarations of Understanding, and since the sanctions described in ¶¶(68) and (74) above are

adequate to compensate plaintiffs for the prejudice suffered by both causes, there is no need to order separate sanctions for this discovery abuse. The Conclusions of Law set forth in ¶¶(64)-(75) are incorporated herein.

3. *Re: The Testimony, Testimony Summary, and Report of Elizabeth Milrod.*

(77) In the context of the overall pattern of discovery abuse described in the Findings of Fact set forth above, defendants' attorneys' failure to provide an adequate summary of Elizabeth Milrod's testimony pursuant to the Court's March 10, 1982 Order and failure to list the Milrod report as a Trial Exhibit constituted "flagrant bad faith" and "callous disregard for their responsibilities" both to plaintiffs and to the Court. See National Hockey League, 427 U.S. at 643.

(78) Because the plaintiffs did not suffer actual prejudice from the trial testimony of Elizabeth Milrod, suppression of that testimony would be an unwarranted sanction which would interfere with determination of the merits of the case. Accordingly, the Court rejects plaintiffs' suggestion that the testimony be stricken.

(79) Because plaintiffs would suffer actual prejudice from admission into evidence of the written report of Elizabeth Milrod, and because there appears to be no way to cure this prejudice other than to strike the report, the Court reinstates its earlier ruling that the report is inadmissible due to defendants' failure through their attorneys to list the report as a Trial Exhibit or even to produce the report to plaintiffs until the day it was offered into evidence. Fed. R. Civ. P. 16; see also United

States v. First Nat'l Bank of Circle, 652 F.2d 882 (9th Cir. 1981); Spellacy v. Southern Pac. Co., 428 F.2d 619 (9th Cir. 1970). The Court notes that the impact of this ruling on the merits of the case will be extremely minimal since the Milrod testimony is not being stricken.

(80) Because plaintiffs were required to take an extra deposition of Elizabeth Milrod in mid-trial merely to obtain a summary of her testimony that defendants' attorneys should have provided before trial pursuant to Local Rule 235-7 and Fed. R. Civ. P. 26(b)(4)(A)(1), see Knighton v. Villian & Fassio e Compagnia, 39 F.R.D. 11, 13 (D. Md. 1965), the defendants' attorneys shall be required to pay plaintiffs' reasonable costs and attorneys' fees in preparing for and taking the April 23, 1982 deposition of Elizabeth Milrod, if such costs and fees have not previously been awarded by this Court or by the Magistrate.

(81) The reason the costs and fees described in ¶(80) above shall be paid entirely by defendants' attorneys is that the failure to comply with the Local Rules regarding summaries of witness testimony appears to the Court to be a violation peculiarly within the province of defendants' attorneys, rather than misconduct attributable to the defendants themselves. Accordingly, defendants' attorneys are required to pay these costs and fees personally, and are prohibited from passing on these costs and fees to their clients. See Fed. R. Civ. P. 37(b)(2); Associated Radio Serv. Co. v. Page Airways, 73 F.R.D. at 636-37.

(82) The Court hereby incorporates by reference ¶¶(70)-(73) above to explain why the sanction described

in ¶(80) does not constitute a finding of criminal contempt.

4. *Re: Trial Exhibit 74 – the Handwritten Memo of Agency Manager Matt Madsen Regarding His Meeting with Muriel Kraszewski.*

(83) In the context of the overall pattern of discovery abuse described in the Findings of Fact set forth above, defendants' attorneys' failure to list the Madsen memo as a Trial Exhibit and their failure to produce the Madsen memo to plaintiffs prior to the discovery cutoff date constituted "flagrant bad faith" and "callous disregard for their responsibilities" to plaintiffs and to the Court. See National Hockey League, 427 U.S. at 643.

(84) Because plaintiffs would suffer actual prejudice from admission into evidence of the Madsen memo, and because there appears to be no way to cure this prejudice other than to strike the memo, the Court rules that the Madsen memo is inadmissible due to defendants' attorneys' failure to list the memo as a Trial Exhibit or even to produce the memo to plaintiffs until the day it was offered into evidence. Fed. R. Civ. P. 16; see also First Nat'l Bank of Circle, 652 F.2d 882; Spellacy, 428 F.2d 619. The Court notes that the impact of this ruling on the merits of the case will be extremely minimal, since the Madsen testimony is not being stricken.

(85) Pursuant to the Court's "inherent power" to manage its cases, see Link v. Wabash R.R., 370 U.S. at 630-31; Renfrew, *Discovery Sanctions: A Judicial Perspective* at 268, the Court orders defendants' attorneys to compensate plaintiffs in the sum of $1,500.00 for the harm caused

by the failure to produce the Madsen memo in accordance with plaintiffs' clear, timely and legitimate discovery request.

(86) The Court hereby incorporates by reference ¶(81) to explain why the sanction described in ¶(85) shall be paid by defendants' attorneys only, and incorporates by reference ¶¶(70)-(73) to explain why the sanction described in ¶(85) does not constitute a finding of criminal contempt.

5. *Re: Trial Exhibit 131.2 – Records of Net and Gross Compensation for Trainee and Sales Agents.*

(87) In the context of the overall pattern of discovery abuse described in the Findings of Fact set forth above, defendants' false statement through their attorneys that the gross and net compensation figures were meaningless or nondiscoverable – despite defendants' eventual use of those figures at trial – constituted "flagrant bad faith" and "callous disregard for their responsibilities" to plaintiffs and to the Court. See National Hockey League, 427 U.S. at 643.

(88) Pursuant to the Court's "inherent power" to manage its cases, see Link v. Wabash R.R., 370 U.S. at 630-31; Renfrew, *Discovery Sanctions: A Judicial Perspective* at 268, the Court orders defendants and their attorneys to compensate plaintiffs in the sum of $5,000.00 for the harm caused by the failure to produce the gross and net compensation figures in accordance with plaintiffs' clear, timely and legitimate discovery request. This sum shall be shared equally between defendants and their attorneys.

(89) The Court hereby incorporates by reference ¶(74) to explain why the sanction described in ¶(88) shall be paid by both defendants and their attorneys, and incorporates ¶¶(70)-(73) to explain why the sanction described in ¶(88) does not constitute a finding of criminal contempt.

6. *Re: The Pending Sanctions Issues from the Three Orders to Compel, Previously Referred to the Magistrate.*

(90) Pursuant to Fed. R. Civ. P. 37(b)(2), the Court orders defendants and their attorneys to pay plaintiffs their reasonable costs and attorneys fees in obtaining the Orders Compelling Discovery of January 18, 1982, February 12, 1982 and May 11, 1982. These costs and fees shall be shared equally by defendants and their attorneys.

(91) The Court hereby incorporates by reference ¶(74) to explain why the sanction described in ¶(90) shall be paid by both defendants and their attorneys, and incorporates ¶¶(70)-(73) to explain why the sanction described in ¶(90) does not constitute a finding of criminal contempt.

Accordingly, in good cause appearing,

IT IS HEREBY ORDERED THAT:

(1) Plaintiffs' motion to strike the testimony of defense witnesses Hunt, Hooker and Smith is denied.

(2) Plaintiffs' motion to strike the testimony of Elizabeth Milrod is denied.

(3) Plaintiffs' motion to strike the report of Elizabeth Milrod is granted.

(4) Plaintiffs' motion to strike the Madsen memorandum – Trial Exhibit 74 – is granted.

(5) Defendants and their attorneys shall pay to plaintiffs:

> (a) a sum of $5,000.00 to compensate plaintiffs for the harm caused by the failure to produce the gross and net compensation figures;
>
> (b) plaintiffs' reasonable costs and attorneys' fees in obtaining the Court Orders of October 9, 1981, January 18, 1982, February 12, 1982 and May 11, 1982, as well as plaintiffs' reasonable costs and attorneys' fees in presenting the sanctions matters to the Special Master and in briefing the sanctions matters to this Court in order to obtain this Order.

All sums, costs and fees described in sub paragraphs (a) and (b) immediately above shall be shared equally between defendants and their attorneys. With respect to attorneys' fees and costs described in subparagraph (b) above, plaintiffs shall file and serve upon defendants within thirty (30) days of the date of this Order the appropriate time-sheets, affidavits and any other necessary documentation, and the defendants shall file within fifteen (15) days of the date such documentation is served upon them any response or challenge to plaintiffs' figures. Such costs and attorneys' fees shall bear interest, accrual thereof to commence from the date of the Court's Order approving said costs and fees, in the amount of 8.72% per annum, compounded daily, in accordance with the Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 55. See Copper Liquor, Inc. v. Adolph Coors Co.,

701 F.2d 542 (5th Cir. 1983); Perkins v. Standard Oil Co. of California, 487 F.2d 672 (9th Cir. 1973).

(6) Should this Court enter judgment against defendants in this case, defendants and their attorneys shall pay to plaintiffs' attorneys not later than thirty (30) days from the date of this Court's judgment in this case the sum of $50,000.00, which sum plaintiffs' attorneys shall deposit in an interest-bearing account to be used for one year from the date of the Court's judgment to pay for the fees and costs incurred in attempting to locate the missing class members; at the conclusion of one year from the date of judgment, plaintiffs' attorneys shall submit to the Court a bill for the fees and costs actually incurred in the location efforts, and after approval by the Court, shall either refund to defendants and their attorneys the amount by which the account balance (including interest) exceeds the approved fees and costs, or shall be reimbursed by defendants and their attorneys for the amount by which the approved fees and costs exceed the account available from the account (including interest). This sum shall be shared equally between defendants and their attorneys.

(7) Defendants' attorneys shall pay to plaintiffs:

(a) Plaintiffs' reasonable costs and attorneys' fees in preparing for and taking the April 23, 1982 deposition of Elizabeth Milrod, unless such costs and fees have previously been paid;

(b) the sum of $1,500.00 to compensate plaintiffs for the harm caused by the failure to produce the Madsen memo in accordance with plaintiffs' clear, timely and legitimate discovery request.

With respect to the costs and fees described in subparagraph (a) immediately above, the parties shall adhere to the same briefing schedule set forth in paragraph (5) above with respect to obtaining Court approval of the costs and fees; and again, once Court approval is obtained, such costs and fees shall bear interest, accrual thereof to commence on the date of the Court's Order approving costs and fees, in the amount of 8.72% per annum, compounded daily, in accordance with the Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 55. See Copper Liquor, 701 F.2d 542; Perkins, 487 F.2d 672.

Defendants' attorneys are required to pay all costs, fees and sums described in subparagraphs (a) and (b) immediately above personally, and are prohibited from passing on these costs, fees and sums to their clients in any way.

(8) Should this Court enter judgment against defendants in this case, defendants shall pay to plaintiffs' attorneys not later than 360 days from the date of the Court's judgment in this case the sum of $250,000.00, which sum plaintiffs' attorneys shall deposit in another interest-bearing account to be used until January 1, 1990 for the payment of any Court-approved recoveries to class members located after the ordinary period for the payments of judgments has lapsed.

This sum shall be borne exclusively by defendants.

(9) Defendants shall pay to Professor May Kay Kane within seven (7) days of the date of this Order the sum of $2918.67 to compensate her for her services as Special Master in this matter, said sum representing her expenses

as approved by the Court for 34 and 2/3 hours at $85.00 per hour.

KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C 79-1261 TEH, January 23, 1984

Full Text of Opinion

HENDERSON, District Judge: – The defendants and their counsel have moved for reconsideration of this Court's order of June 9, 1983 which assesses against them sanctions for discovery abuse. The matter has been exhaustively briefed and argued and, for the reasons stated below, the June 9th Order will be modified, in part, to reflect (1) the new evidence regarding production of the Madsen memo and (2) the appropriate statutory basis for the plaintiff's award of costs and attorneys' fees incurred in obtaining various motions to compel discovery. We find the moving parties' remaining objections to the June 9th Order to be without merit. Accordingly, their motion for reconsideration will be granted in part and denied in part. In the present order, we also grant the request of defendants and their counsel for a stay of this court's consideration of the plaintiffs' application for attorneys' fees and costs under paragraph (5)(b) of the June 9th Order at 31-32, pending further and limited discovery.

In moving for reconsideration of this Court's order of June 9, 1983, the defendants and their counsel challenge (1) the Court's characterization of the sanctions levied in that order as civil, (2) the sufficiency of the evidence

supporting the Court's findings of discovery abuse, and (3) the adequacy of their opportunities to be heard. Each challenge is discussed briefly and in turn below. Additionally, in response to the discovery dispute which has arisen regarding the plaintiffs' application for attorneys' fees under the June 9th Order, an expedited discovery and briefing schedule is set. The precise order of the Court in these related matters appears at the conclusion of this decision.

I. MOTION FOR RECONSIDERATION

A. *The Nature of the Sanctions*

The defendants and their counsel first challenge the Court's characterization of the sanctions levied in the June 9th Order as civil. They contend that the sanctions are punitive and were imposed without regard to the defendants' and their counsel's procedural rights under Rule 42(b) of the Federal Rules of Civil Procedure.[1] In support of this position, they argue that (1) the order's strong language is inconsistent with its compensatory purpose and effectively alters the nature of the sanctions from civil to criminal, and (2) the monetary sanctions imposed are not tailored to match the harm suffered by

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[1] Rule 42(b) governs the imposition of criminal contempt, levied pursuant to the court's inherent contempt power or its contempt power under Rule 37(b)(2)(D) of the Federal Rules of Civil Procedure. Rule 42(b) has been interpreted to require notice, a hearing, reasonable time to prepare a defense, proof of contempt beyond a reasonable doubt and the right to trial by jury in certain cases. See Falstaff Brewing Corp. v. Miller Brewing Corp., 702 F.2d 770, 777-78 n. 1 (9th Cir. 1983).

the plaintiffs and therefore cannot support their civil, compensatory label. Neither contention has merit.

First, sanctions are never "wholly civil nor altogether criminal." Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 441 (1911). It is their primary purpose, however, rather than their incidental effects, which determines their civil or criminal nature. Falstaff Brewing Corp. v. Miller Brewing Corp., 702 F.2d 770, 778 (9th Cir. 1983) (hereafter cited as "Falstaff Brewing Corp."). The test is: what did the sanctioning court primarily seek to accomplish by imposing the sanctions? Falstaff Brewing Corp., 702 F.2d at-778. If the primary purpose of the sanction was to punish past defiance of a court's judicial authority, and thereby vindicate the court – the sanction is considered punitive and criminal. If, however, the court intended to compel obedience to a court order or to compensate the injured party for the harm suffered by his adversary's misconduct, the sanction is treated as civil. Id.

The defendants and their counsel suggest that this Court's clearly stated and executed goal of fashioning appropriate civil, compensatory sanctions is undercut by the Order's language which reveals this Court's displeasure with their conduct. No authority is cited for this proposition and we have found none to support it. To the contrary, given the district court's broad discretion to devise sanctions which effectively address discovery abuse, United States v. Westinghouse, 648 F.2d 642, 651 (9th Cir. 1981), it seems unlikely that a court, greatly disturbed by the conduct of a party or its counsel, is constrained from expressing that displeasure simply because it chooses to deal with the offensive behavior by

civil rather than criminal sanctions. We thus decline to alter the language of the June 9th Order on this ground.

Second, the defendants' and their counsel argue that the monetary sanctions do not adequately reflect the harm or prejudice suffered by the plaintiffs. By so arguing, they rightly note that the goal of compensatory sanctions is to make the injured party whole. Falstaff Brewing Corp, 702 F.2d at 779. In fashioning a compensatory sanction, the Court must tailor its award to the pecuniary injury caused by the unexcused conduct. Id. The amount necessary to compensate the aggrieved party may be estimated by the sanctioning court. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1371 (9th Cir. 1980).

The June 9th Order provides for conditional and absolute monetary sanctions. The conditional sanctions, described at paragraphs 68 and 69 of the order, mature only if (1) the plaintiffs prevail on the merits, and (2) this Court approves any requested fees and recoveries as reasonable and appropriate. In other words, even if they prevail, the plaintiffs and their counsel will not be entitled to any compensatory awards until they make showings of need and injury, and those showings are tested by their adversaries and approved by this Court. We believe that this procedure will ensure that the awards approved, if any, will reflect the losses suffered by the plaintiffs and their counsel. Moreover, we reject the defendants' and their counsel's contention that the absolute award of $5000 provided by paragraph 88 of the June 9th Order, is an unreasonable estimation of the prejudice suffered by the plaintiffs because of their inability to present this Court with their version of critical financial information.

See June 9th Order at ¶¶37-45, 87-89. After fully reconsidering the propriety of the award, we believe that it adequately reflects and monetizes the strategic loss suffered by the plaintiffs and thus decline to alter the amount of the modest sum awarded.

B. *Sufficiency of the Evidence*

The defendants and their counsel next broadly challenge the sufficiency of the evidence supporting this Court's findings of discovery abuse. After careful review of the record, we find the defendants' and their counsel's position as to the Madsen memo well-taken and the June 9th Order will be modified to reflect it. Their remaining arguments, however, we reject.

First, we agree that the record no longer supports the monetary and preclusionary sanctions levied in regard to the Madsen memo. With their motion for reconsideration, the defendants and their counsel present new and undisputed evidence which reveals that the Madsen memo was properly listed as a trial exhibit. Moreover, on further reflection, we believe that the disputed factual circumstances surrounding the tardy production of the memo alone cannot support the sanctions levied. Accordingly, findings of fact 30 through 36, and findings of law 83 through 86 will be vacated. Additionally, the Madsen memo will be admitted into evidence and the plaintiffs will be ordered to return the $1500 monetary sanction to defense counsel.

Second, we find that the record fully supports the remaining sanctions. Accordingly, we reject the contentions of defendants and their counsel that the tardy production of the AIB Cards, Declarations of Understanding, the Milrod

Report and the net compensation date cannot support the sanctions levied.

C. *Due Process*

The defendants and their counsel lastly argue that they have been denied adequate opportunities to explain their conduct. They assert that this Court erred in failing to hold an evidentiary hearing before it imposed civil sanctions under its Rule 37(b)(2)(D) contempt power, Fed. R. Civ. P.[2] and pursuant to its inherent managerial powers, see Link v. Wabash, 370 U.S. 626, 630-31 (1962). They also claim that their hearing rights under Rule 37(a)(4) of the Federal Rules of Civil Procedure were violated by this Court's failure to hold separate hearings on the propriety of awarding the plaintiffs their reasonable expenses under that rule.[3] We find both positions unsupportable.

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[2] Rule 37(b)(2)(D) provides, in relevant part:

> If a party . . . fails to obey an order to provide or permit discovery, . . . the court . . . may make such orders in regard to the failure as are just, and among others the following:
>
> (D) . . . an order treating as a contempt of court the failure to obey any orders. . . .

[3] In our Order of June 9, 1983, we mistakenly awarded the plaintiffs their reasonable costs and attorneys' fees in obtaining the Court Orders of October 9, 1981, January 18, 1982, February 12, 1982, and May 11, 1982, under Rule 37(b)(2) of the Federal Rules of Civil Procedure. As the defendants and their counsel rightly point out, the proper basis of that award is Rule 37(a)(4) of the Federal Rules of Civil Procedure. See supra at note 4 for the text of Fed. R. Civ. P. 37(a)(4). The Order of June 9, 1983 will be modified to correct the Court's error.

First, the Ninth Circuit has consistently rejected the position put forth by defendants and their counsel that an *evidentiary* hearing must always precede the imposition of sanctions. See, e.g., Wyle v. R. J. Reynolds, 709 F.2d 585, 592 (9th Cir. 1983) ("*When necessary*, the district court *may* hold an evidentiary hearing on a motion for sanctions.") (Emphasis added). In this circuit and others, the dictates of due process are satisfied where the sanctioned party has a real and full opportunity to explain his questionable conduct before sanctions are imposed. See, e.g., Miranda v. Southern Pacific, 710 F.2d 516, 522 (9th Cir. 1983); United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983); United States v. Westinghouse, 648 F.2d 642, 652 (9th Cir. 1981); see also, Margoles v. Johns, 587 F.2d 885, 888-89 (5th Cir. 1978). Moreover, where, as here, the briefs, affidavits and other documentary evidence, fully recount the non-compliance with the court's orders and reveal no material factual disputes, courts have long discounted the need for evidentiary hearings. Hoffman Etc. v. Beer Drivers and Salesmen's, Etc., 536 F.2d 1268, 1277, 92 LRRM 3302 (9th Cir. 1976); Margoles v. Johns, 587 F.2d at 888-89. Indeed, neither in their briefs nor at oral argument on this motion, did the defendants or their counsel point to any circumstances which would support their request for an evidentiary hearing. We therefore reaffirm our finding at paragraph 73 of the Order that "the extensive briefing and hearing opportunities afforded defendants and their counsel in this matter have provided them with due process."

Second, we find no merit in the contention of defendants and their counsel that they have not had an adequate opportunity to explain why their oppositions to the

plaintiffs' motions to compel discovery were "substantially justified." Fed. R. Civ. P. 37(a)(4).[4] To the contrary, the record reflects that the defendants and their counsel have fully explained their oppositions to each of the plaintiffs' motions to compel discovery at issue here. Those explanations were offered by the defendants and their counsel during their oral and written oppositions to the substantive motions to compel discovery. Moreover, neither in their briefs nor at oral argument on this motion, did they raise any new or different information from that which has already been presented to and rejected by this Court. Accordingly, we hold that the hearing requirement of Rule 37(a)(4) has been fully satisfied. See Persson v. Faestel Investments, Inc., 88 F.R.D. 668, 670 (N.D. Ill. E.D. 1980) (Where the sanctioned party has fully explained his conduct in opposing the motion to compel discovery and has thereby presented the court with a sufficient record from which it can determine whether the conduct was "substantially justified," a separate hearing on the propriety of the award of expenses and fees is not required.). Of course, the defendants and

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[4] Rule 37(a)(4) provides in relevant part,

> If the motion [to compel] is granted, the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

their counsel will have full opportunity to challenge the *reasonableness* of any award of expenses and fees made under Rule 37(a)(4). In this motion, we reject only the need for an additional hearing as to the *propriety* of those awards.

II. PLAINTIFFS' APPLICATION FOR COSTS AND ATTORNEYS' FEES.

Moving under the June 9th Order, the plaintiffs have submitted an application for attorneys' fees of $99,843.00 and costs of $421.00. See paragraph (5)(b) of the June 9th Order at 31-32. The defendants and their counsel challenge the adequacy of the documentation supporting the plaintiffs' application and ask this Court to (1) stay our consideration of the application pending further discovery, and (2) order the plaintiffs to produce copies of original time sheets in support of the application.

After carefully considering the conflicting interests presented by this dispute, we conclude that it is appropriate to briefly stay our consideration of the plaintiffs' application to allow the defendants to engage in limited and expedited discovery. In so ruling, we accept as reasonable the contention of defendants and their counsel that they are entitled to review copies of the pertinent original timesheets kept by plaintiffs in this action. See paragraph (5)(b) of the June 9th Order at 31:23-24; see also 1 Pt. 2 Moore's Federal Practice ¶1.47 at 49. However, we reject emphatically, as unnecessary, unreasonable and burdensome, the request of the defendants and their counsel to review copies of *all* timesheets kept by plaintiffs' counsel during the period of this protracted

litigation. We will therefore order the plaintiffs to produce copies of the original time sheets which support the typed compilations of hours which they have already submitted to this Court within twenty days of the date of this order. Additionally, defendants and their counsel will be ordered to notice and schedule the desired depositions of Messrs. Jerome Falk and Stanley Friedman, according to the applicable federal and local rules, within twenty days of the date of this order.[5]

After the close of this limited discovery, the defendants and their counsel will have fifteen days to file a response to the plaintiffs' application for attorneys' fees and costs. Ten days thereafter, the plaintiffs shall file their reply, if any, to the opposing papers. A hearing on the plaintiffs' application will then be scheduled by the Court forthwith.

III. ORDER

For the reasons stated above, IT IS HEREBY ORDERED that:

1. Findings of fact thirty (30) through thirty-six (36), conclusions of law eighty-three (83) through eighty-six (86), and paragraph (7)(b) at 33:1-4 in this Court's order of June 9, 1983 assessing sanctions for discovery abuse are vacated.

2. The Madsen memo is admitted into evidence.

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[5] In so ruling, we express no opinion in the need or propriety of the requested depositions.

3. Plaintiffs shall return the $1500.00 monetary sanction erroneously levied in connection with the Madsen memo to the defendants within ten days of the date of this order.

4. The June 9th Order is modified at paragraphs 68 (21:4), and 90 (30:14), to strike the erroneous references to Rule 37(b)(2) of the Federal Rules of Civil Procedure and to reflect the proper authority of Rule 37(a)(4) of the Federal Rules of Civil Procedure.

5. The remainder of the motion for reconsideration is denied.

6. Consideration of the plaintiffs' application for attorneys' fees is stayed, pending completion of the limited and expedited discovery ordered below:

a. Within twenty days of the date of this order, plaintiffs shall produce for defendants and their counsel copies of those original time sheets kept by plaintiffs' counsel in this case which support the typed compilations of hours already submitted.

b. Within twenty days of the date of this order, defendants and their counsel are ordered to notice and schedule, according to the applicable federal and local rules, the desired depositions of Messrs. Falk and Friedman.

7. Defendants are granted fifteen days, after the close of the limited discovery period described at paragraph six, supra, to respond to the plaintiffs' application for attorneys' fees and costs. Plaintiffs are granted ten

days from the filing of the opposing papers to submit a reply, if any. Copies of all briefs in this matter will be hand delivered to this chambers and to the opposing party.

IT IS SO ORDERED.

KRASZEWSKI v. STATE FARM INS. CO.

U.S. District Court,
Northern District of California

KRASZEWSKI, et al. v. STATE FARM GENERAL INSURANCE COMPANY, et al., No. C79-1261 TEH, June 11, 1984

Full Text of Opinion

HENDERSON, District Judge: – In our Order of June 9, 1983, assessing against defendants and their counsel sanctions for discovery abuse, and in our related Order of January 23, 1984, upholding in large part the earlier decision against the motion for reconsideration filed by defendants and their counsel, we ruled that the plaintiffs were entitled, under Rule 37(a)(4) of the Federal Rules of Civil Procedure, to be reimbursed for the expenses they incurred in obtaining the improperly denied discovery and in seeking sanctions for the discovery abuse before a special master and this Court. Now before the Court is the plaintiffs' application for an award of reasonable attorneys' fees and costs under those orders. With this application, the plaintiffs also ask to be compensated for the additional expenses they have sustained in upholding the Order of June 9, 1983 against the motion for reconsideration and in submitting the present fee application to the Court. In total, they seek an award of $139,748.25 in attorneys' fees and $908.50 in costs.

The defendants and their counsel oppose the plaintiffs' request for compensation challenging, in the main, (1) the plaintiffs' entitlement to fees and costs sustained

in opposing the motion for reconsideration and in presenting this fee application to the Court, (2) the adequacy of the factual showing made by the plaintiffs in support of the claimed time expenditures, (3) the propriety of using appropriate current hourly rates to calculate a reasonable fee, and (4) the plaintiffs' entitlement to a fully compensatory award in light of their failure to prevail on one claim.

This Court has carefully considered the written and oral arguments of counsel and the extensive evidentiary record presented. Based on that review, as well as our familiarity with the underlying disputes, the performance of the plaintiffs' counsel, and our application of the pertinent Kerr v. Screen Extras Guild, Inc. factors,[1] we conclude that plaintiffs are entitled to attorneys' fees in the amount of $131,031.25 and costs of $908.50. This award reflects our conclusions that: (1) the plaintiffs are entitled, under Rule 37(a)(4) of the Federal Rules of Civil Procedure, to be reimbursed for the fees and costs they reasonably incurred in opposing the motion for reconsideration and in presenting this fee application to the Court, (2) the factual showing made by the plaintiffs in support of the time expenditures of their counsel is

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[1] In Kerr, 526 F.2d 67, 70, 90 LRRM 3272 (9th Cir. 1975), cert. denied sub nom. Perkins v. Screen Extras Guild, 425 U.S. 951, 92 LRRM 2058 (1976), the Court of Appeals established that the determination of a reasonable fee is accomplished by consideration of the twelve factors enumerated in Johnson v. Georgia Express, Inc., 488 F.2d 714, 7 FEP Cases 1 (5th Cir. 1974). For further discussion of the calculation of the reasonable fee, see infra at pp. 11-20.

sufficient to establish 835.15 compensable hours; (3) use of appropriate current hourly rates equitably adjusts the fee award for the combined effects of delay and inflation, and (4) a reduction of $2000.00 in the lodestar calculation is appropriate to reflect the plaintiffs failure to prevail on the Madsen memo issue.

I. *BACKGROUND*

A. *Procedural History*

We established the plaintiffs' entitlement to an award of expenses in our Order of June 9, 1983 (hereafter referred to as the "June Sanctions Order"). In that Order, we found that the plaintiffs were entitled, under Rule 37(a)(4) of the Federal Rules of Civil Procedure,[2] to reasonable compensation for the efforts of their counsel "in obtaining the Court Orders of October 9, 1981, January 18, 1982, February 12, 1982 and May 11, 1982, . . . [and] in presenting the sanctions matters to the Special Master and in briefing the sanctions matters to this Court in

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[2] In pertinent part, Rule 37(a)(4) provides:

> If the motion [to compel] is granted, the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

order to obtain this Order." June Sanctions Order, 31-32 at ¶(5)(b); Order of January 23, 1984, 7 n. 3 and 11 at ¶4 (hereafter referred to as the "January Sanctions Order").[3] We also ruled that compensation was available to the plaintiffs for the expenses reasonably incurred "in preparing for and taking the April 23, 1982 deposition of Elizabeth Milrod." June Sanctions Order, 32 at ¶(7)(a), 26-28 at ¶¶(77)-(82).[4]

Calculation of a reasonable award for the matters identified in the June Sanctions Order was delayed by this Court's consideration of the sweeping motion for reconsideration filed by the defendants and their counsel. The motion for reconsideration was exhaustively briefed and argued in this Court. In our Order of January 23, 1984, we upheld, in large part, the June Sanctions Order against the motion for reconsideration. See January Sanctions Order. We did, however, find that the record no longer supported our findings regarding defense counsel's purported failure to produce or properly list as a trial exhibit a one-page document known as the "Madsen memo." See January Sanctions Order, 5-6. As to that claim, the motion for reconsideration was granted and the June Sanctions Order amended accordingly. See id. at 11, ¶¶1-3.

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[3] The fees and costs assessed under this portion of the June Sanctions Order are to be borne equally by defendants and their counsel. See June Sanctions Order, 31 at ¶(5)(b)

[4] The fees and costs assessed by this portion of the June Sanctions Order are to be borne only by defendants' counsel. See June Sanctions Order, 32 at ¶ (7)(a).

In the January Sanctions Order, we also resolved several discovery disputes concerning the plaintiffs' application for fees and costs which had been filed shortly before the motion for reconsideration. See id. at 9-10, 11-12 at ¶¶6-7; see also Plaintiffs' Application for Reasonable Attorneys' Fees and Costs Pursuant to Order Assessing Sanctions for Discovery Abuse, June 30, 1983. We provided for a brief period of discovery to be followed by briefing and a hearing on the reasonableness of the compensation requested by the plaintiffs under the Sanctions Orders. See January Sanctions Order, 9-10, 11-12 at ¶¶6-7. A hearing on the plaintiffs' application for costs and fees was held in this Court on April 26, 1984. After supplemental briefing, the matter was submitted on May 10, 1984.

B. *The Plaintiffs' Application for Reasonable Attorneys' Fees and Costs.*

The plaintiffs have documented their request for an award of reasonable expenses in three stages. On June 30, 1983, they submitted an application for attorneys' fees of $99,843.00 and costs of $421.00 for the expenses incurred in pursuing the matters identified in the June Sanctions Order. On March 8, 1984, the plaintiffs filed additional documentation to support their bid for $37,894.50 in attorneys' fees to cover the expenses they incurred in opposing the motion for reconsideration and in presenting the fee application to this Court. And, on April 26, 1984, the plaintiffs amended slightly their total request for compensation, seeking an additional $2,010.75 in attorneys' fees and $487.50 in costs. This final portion of the fee request reflects additional expenses incurred by

plaintiffs since March 8, 1984 and corrects several errors in the earlier submissions.

The plaintiffs document their request for $139,748.25 in attorneys' fees, the major portion of their application for compensation, in the following ways. To establish the number of hours spent by their counsel – Guy T. Saperstein, Jeffrey S. Brand, Brad Seligman and Ruby S. Udell – on compensable matters, the plaintiffs submit time summaries for each attorney for whose services compensation is sought.[5] The summaries were compiled from contemporaneous, hand-written time records which each lawyer maintained daily throughout this litigation.[6] Each entry indicates the hours logged by the attorney that day and describes the activity or activities which consumed his or her time. To attest to the accuracy and trustworthiness of the time summaries, the plaintiffs submit declarations from Messrs. Saperstein, Brand, and Seligman which describe the manner in which the summaries were prepared and which indicate generally, and in narrative form, the nature of and need for the work performed.[7] Further, the sufficiency of the time keeping practices used generally by plaintiffs' counsel, and reflected in the time summaries, is supported by the statements of prominent local counsel who attest, in sworn declarations and deposition testimony, that the time records maintained by

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[5] See Exhibits 1, 12 to Plaintiffs' Application for Reasonable Attorneys' Fees and Costs Pursuant to Order Assessing Sanctions for Discovery Abuse (hereafter referred to as "Plaintiffs' Application for an Award of Expenses"); see also Plaintiffs' Proposed Reductions and Additions of Attorneys' Fees and Costs.

[6] See Exhibits 3, 4, 9, 11 and 13 to Plaintiffs' Application for an Award of Expenses.

[7] Id.

their respective firms in the normal course of business are virtually identical in form to those maintained by plaintiffs' counsel and submitted to the Court.[8] Also before the Court, as a result of the limited discovery provided by the January Sanctions Order, are copies of the contemporaneous, handwritten time records from which the time summaries were excerpted.[9]

On the basis of this factual showing, the plaintiffs seek compensation for the following time expended by their counsel:

ATTORNEY	HOURS
Guy T. Saperstein	271.30
Jeffrey S. Brand	506.75
Brad Seligman	34.20
Ruby S. Udell	64.50
	876.75

To establish an appropriate and reasonable hourly rate for the services of their counsel, the plaintiffs present declarations from their attorneys and prominent local counsel which describe the relevant rate structures and billing practices used generally in this community. Specifically, to support the reasonableness of the hourly rates requested, the plaintiffs submit sworn statements from Messrs. Saperstein and Brand which attest to: (1) the level of experience and education attained by each of the

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[8] See Exhibits 7, 10 to Plaintiffs' Application for an Award of Expenses.

[9] See Exhibits 7, 8, 9, 10, 11, 12, 13, 14 and 15 to Declaration of William G. James in Support of Defendants' Response to Plaintiffs' Application for Attorneys' Fees and Costs.

plaintiffs' attorneys,[10] (2) the current hourly rates at which clients are charged for their services in cases of similar complexity,[11] and (3) the hourly rates set by Courts of this District in calculating fee awards for plaintiffs' counsel in recent cases of similar complexity.[12] Prominent local attorneys also submit sworn statements in which they attest to the high regard in which the plaintiffs' counsel are held in the local legal community.[13] These declarations from local counsel also describe the rates charged and billing practices used by their respective law firms and indicate the hourly rates which counsel of similar experience, reputation and skill command in cases of similar complexity in the area.[14] The declarations indicate that lawyers with comparable qualifications and expertise bill their clients in cases of this sort at rates that are similar to and, in some instances, higher than the hourly rates plaintiffs propose.

On the basis of this factual showing, the plaintiffs seek compensation for the services of their counsel at the following hourly rates:

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[10] See Exhibits 3, 4 and 9 to Plaintiffs' Application for an Award of Expenses.

[11] Id.

[12] See Exhibit 3 to Plaintiffs' Application for an Award of Expenses.

[13] See Exhibits 5 and 8 to Plaintiffs' Application for an Award of Expenses.

[14] See Exhibits 5, 6, 7 and 8 to Plaintiffs' Application for an Award of Expenses.

ATTORNEY	HOURLY RATES[15]
Guy T. Saperstein	$165.00
Jeffrey S. Brand	165.00
Brad Seligman	125.00
Ruby S. Udell	110.00

In sum, the plaintiffs seek reimbursement for attorneys' fees of $139,748.25 and costs of $908.50. The requested award is calculated as follows:

I. Attorneys' fees

ATTORNEY	HOURS	HOURLY RATE	TOTAL
Guy T. Saperstein	271.30	$165.00	$ 44,764.50
Jeffrey S. Brand	506.75	165.00	83,613.75
Brad Seligman	34.20	125.00	4,275.00
Ruby S. Udell	64.50	110.00	7,095.00
			$139,748.25

[15] The hourly rates proposed by the plaintiffs reflect their counsel's current rates. According to a sworn statement submitted by Mr. Saperstein, the rates became effective January 1, 1984 and represent a routine annual increase designed to reflect increases in the hourly rates prevailing in the legal community, greater experience by counsel and inflation. See Exhibit 9 to Plaintiffs' Application for an Award of Expenses.

II. Costs

A. $421.00 – the cost of the deposition transcript for the April 23, 1982 deposition of Elizabeth Milrod.

B. $487.50 – costs related to the deposition of Jerome Falk, Jr. regarding the present fee application.

$908.50

This Court has reviewed the plaintiff's application for attorneys' fees and costs in light of the objections raised by the defendants and their counsel, and pursuant to our independent obligation to carefully scrutinize applications for courtawarded compensation. Recognizing that several aspects of our fees setting function requires estimations and approximations, we have exercised our discretion in this matter, informed by our extensive knowledge of this litigation and our experience with numerous other cases, to arrive at an award which we believe is fair, reasonable and appropriately compensatory. See Hensley v. Eckerhart, 461 U.S. 424, ___, 103 S.Ct. 1933, 1941-42, 31 FEP Cases 1169 (1983); White v. City of Richmond, 713 F.2d 458, 460 (9th Cir. 1983); Laffey v. Northwest Airlines, Inc., 572 F.Supp. 354, 361, 32 FEP Cases 770 (D.D.C. 1983). What follows is the analysis on which we base our award of attorneys' fees of $131,031.25 and costs of $908.50.

II. DISCUSSION

A. *The Plaintiffs' Entitlement to the Additional Fees and Costs Sought*

As an initial matter, we have no trouble concluding that the plaintiffs are entitled to recover the reasonable expenses they incurred both in defending the June Sanctions Order against the sweeping and largely unsuccessful motion for reconsideration filed by the defendants and their counsel, and in litigating the present fee application in this Court. To rule otherwise would contravene the just and well-established principle that failure to reimburse fee applicants for *all* efforts reasonably made to secure their rightful claim to compensation wrongly dilutes the ultimate award of expenses. See, e.g., Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1126 (9th Cir. 1981) ("attorneys fees may be awarded for time devoted in successfully defending appeals of or challenges to the district court's award of fees"); Manhart v. City of Los Angeles, Dept. of Water, Etc., 652 F.2d 904, 909, 26 FEP Cases 721 (9th Cir. 1981) ("time spent litigating the fee issue itself in the district court" is compensable); see also Tamari v. Bache & Co. (Lebanon) S.A.L., No. 83-1950, slip op. at 10-11 (7th Cir. Feb. 27, 1984); Aerway Laboratories, Inc. v. Arco Polymers, Inc., 90 F.R.D. 563, 565-66 (N.D. Ill. 1981). A contrary ruling would also undermine the compensatory purpose of Rule 37(a)(4). See Aerway Laboratories, Inc. v. Arco Polymers, Inc., 90 F.R.D. at 565-66 (Rule 37(a)(4) encompasses "*all* expenses, whenever incurred, that would not have been sustained had the opponent conducted itself properly.") (emphasis added); see also Tamari v. Bache & Co. (Lebanon) S.A.L., No. 83-1950, slip op. at 10-11.

We therefore reject, as unfounded, the challenge of defendants and their counsel to the propriety of compensating the plaintiffs for the efforts of their counsel in opposing the motion for reconsideration and in litigating the fee application. We next turn to the major task before us, that of calculating an award which fairly compensates the plaintiffs for the efforts of their counsel in the matters identified by the June Sanctions Order and the additional matters which we specify here.

B. *Calculation of the Reasonable Fee*

"The most useful point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1939; see also White v. City of Richmond, 713 F.2d at 460. This calculation produces the "lodestar" of the Court's base hourly fee analysis. See White v. City of Richmond, 713 F.2d at 460-61; Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 838-41 (9th Cir. 1982); Manhart v. City of Los Angeles, Dept. of Water and Power, 652 F.2d at 907; Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70, 90 LRRM 3272 (9th Cir. 1975), cert. denied sub nom. Perkins v. Screen Guild, Inc., 425 U.S. 951, 92 LRRM 2058 (1976); Powell v. U.S. Dept. of Justice, 569 F.Supp. 1192, 1202 (N.D. Cal. 1983). In this circuit, the two elements in the lodestar equation – the number of hours reasonably expended and the reasonable hourly rate – are fixed by considering the factors designated by the Court of Appeals in Kerr v. Screen Extras Guild, Inc., 526 F.2d at 70, which are applicable to the particular case. Sapper v.

Lenco Blade, Inc., 704 F.2d 1069, 1073 (9th Cir. 1983). The twelve Kerr factors are:

(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d at 70.

A preliminary – and critical factor – in arriving at the lodestar sum is the quality of the factual showing made by the fee applicant in support of the hours claimed and the hourly rates requested. See Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1939; White v. City of Richmond, 713 F.2d at 461; Shakey's, Inc. v. Covalt, 704 F.2d 426, 435-36, n. 14 (9th Cir. 1983); see also National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1324-29, 28 FEP Cases 1134 (D.C. Cir. 1982). To allow the Court and opposing counsel to adequately assess the merits of the fee request, the fee applicant must present a record of sufficient detail and trustworthiness "that the time expended and the need for the services are clearly established." White v. City of Richmond, 713 F.2d at 461. He also must present "specific evidence" of the prevailing community rate which counsel of similar experience, reputation, and skill command in cases of similar complexity in the community. National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d at

1325; see also White v. City of Richmond, 713 F.2d at 460. Where the fee application falls short of the required level of detail, the insufficiently documented hours and rates are disregarded. See White v. City of Richmond, 713 F.2d at 461; see also Hall v. City of Auburn, 567 F.Supp. 1222, 1228, 32 FEP Cases 486 (D. Me. 1983) (disallowing particular hours claimed because of vague work descriptions and time inconsistently recorded by several attorneys); Kane v. Martin Paint Stores, 439 F.Supp. 1054, 1056 (S.D. N.Y. 1977), aff'd, 578 F.2d 1368 (1978) (reducing the lodestar by 10% because of the applicant's failure to keep more precise time records); International Travel, etc. v. Western Airlines, 623 F.2d 1255, 1275 (8th Cir. 1980), cert. denied, 449 U.S. 1063 (1980) (uncertainties which arise because of imprecise recordkeeping should be resolved against the fee applicant.)

Once the lodestar is established, it may be adjusted upward or downward to reflect the characteristics of the particular case and counsel. Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1940-41; White v. City of Richmond, 713 F.2d at 461; see also Blum v. Stenson, 465 U.S. ___, 52 LW 4377, 4381-82, 34 FEP Cases 417 (U.S. March 21, 1984) (Brennan, J., concurring). In making these adjustments, the less objective of the Kerr factors again guide the Court. Of those factors, the Supreme Court has recently instructed that "the degree of success" or "the results obtained" is most critical. Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1940-41; see also White v. City of Richmond, 713 F.2d at 461.

With the present application for reasonable attorneys' fees, the plaintiffs seek only the lodestar sum. In opposing the plaintiffs' fee request, the defendants first,

and primarily, challenge the trustworthiness and evidentiary sufficiency of the time summaries submitted by the plaintiffs to document the hours spent by their counsel on compensable matters. The defendants contend that the poor record keeping practices of plaintiffs' counsel – evidenced by purportedly vague and composite work descriptions, internal inconsistencies among the time records of the four plaintiffs' attorneys, and rounded hourly time entries – justify denial of all fees or, in the alternative, call for a drastically reduced award.

1. *The Adequacy of the Plaintiffs' Factual Showing*

For the most part, the critique offered by the defendants and their counsel does not seriously undermine the plaintiffs' sound and adequate presentation. Contrary to their opponents' suggestion, the plaintiffs are not required to recite "the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainment of each attorney." Copeland v. Marshall, 641 F.2d 880, 891, 23 FEP Cases 967 (D.C. Cir. 1980) (en banc); accord Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1941 n.12; Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161, 167 (3rd Cir. 1973); City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2nd Cir. 1974); see also Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1473, 26 WH Cases 152 (9th Cir. 1983); Shakey's Inc. v. Covalt, 704 F.2d at 435-36. Their documentary burden is satisfied by the production of "fairly definite information" as to the hours logged, Copeland v. Marshall, 641

F.2d at 891 (quoting Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d at 167), the "general subject matter" of the work performed, Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1941 n.12, and in most cases, the approximate date of performance. In this circuit, that information can be provided by affidavits, time sheets or the like. See, e.g., White v. City of Richmond, 713 F.2d at 461; Shakey's Inc. v. Covalt, 704 F.2d at 435-36; Bonnette v. California Health and Welfare Agency, 704 F.2d at 1473.

The plaintiffs document the present fee application with detailed summaries based on contemporaneous time records. See supra at pp. 5-7. For the most part, the summaries indicate the general subject matter of the work performed by each of the four attorneys for whom fees are sought, the amount of the attorneys' time the tasks consumed and the dates of performance. To attest to the trustworthiness of the time summaries, the plaintiffs submit foundational evidence, sworn declarations from counsel indicating that the summaries were compiled by the two senior attorneys, Messrs. Saperstein and Brand, after review of each attorneys' handwritten contemporaneous time records. They further attest that *daily* time records were kept by counsel throughout this litigation.

The time summaries submitted by the plaintiffs easily satisfy the burden of documentation described. From the majority of the work descriptions provided, we can clearly discern the nature of the task for which compensation is sought, the general subject matter of the work, the amount of time expended and the date of performance. The plaintiffs' documentation is thus sufficient, in large part, to permit opposing counsel to adequately assess the

merits of the fee request and to allow this Court to independently determine whether the claimed expenditures are compensable under the subject orders and whether the amount of time spent on the compensable matters was reasonable and justified. See White v. City of Richmond, 713 F.2d at 461; National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d at 1327. Moreover, we are satisfied, from our review of the time summaries and the virtually identical corresponding entries in the original time records, that the plaintiffs' attorneys have recorded their time with sufficient accuracy and care to support an award of fees.

Despite our conclusion that the structure of the plaintiffs presentation is basically sound, we agree with the defendants and their counsel that certain ambiguities in the time summaries and the underlying time records must be resolved against the plaintiffs. Below we consider separately the time keeping practices of plaintiffs' counsel challenged by the defendants and their counsel as deficient.

a. *The Work Descriptions:* As already noted, the vast majority of the work descriptions provided meet or exceed the required level of specificity. A small percentage of the entries, however, indicate only the activity undertaken – e.g., an intra-firm conference – and fail to disclose the general subject matter of the activity. Without this additional, albeit general, information, this Court is unable to determine whether the time claimed falls within one of the compensable categories. Accordingly, the time described in this manner must be disallowed in

the calculation of the lodestar of this interim fee award.[16] Based on our independent review of the time sheets and underlying time records, we conclude that 17.8 hours claimed by Mr. Saperstein,[17] 11.5 hours claimed by Mr.

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[16] In a number of instances, the insufficiently described activity is one of several activities described in a single entry and designated by a single time expenditure. In those instances, this Court has exercised its discretion to estimate the amount of time to be disallowed. See Laffey v. Northwest Airlines, Inc., 572 F.Supp. 354, 361, 32 FEP Cases 770 (D.D.C. 1983) (Because many of the tasks involved in calculating a fee award are "inherently imprecise and require certain estimates or approximations," the court must often exercise its discretion in formulating an appropriate fee.). Our estimates are the product of several considerations, including the nature of the activity insufficiently described, the other activities listed in the entry and pertinent evidence bearing on the subject matter of the activity drawn from the more precise descriptions provided by other counsel.

[17] Below are noted the work descriptions in Mr. Saperstein's time summaries which this Court has found deficient and the corresponding deductions in time made:

9/10/81	Conference with Brand, .5 hrs. disallowed;
9/07/81	Conference with Brand, .5 hrs. disallowed;
9/24/81	Phone call to law clerk, .2 hrs. disallowed;
10/09/81	Conference with Brand, .5 hrs. disallowed;
10/09/81	Phone call from Goldstein, .5 hrs. disallowed;

(Continued on following page)

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10/28/81	Conference with Brand, .5 hrs. disallowed;
1/29/82	Phone call to/from Brand and Udell, hrs. disallowed;
5/07/82	Conference with Brand, 2.0 hrs. disallowed;
5/10/82	Conference with Brand, 1.0 hrs. disallowed;
5/11/82	Conference with Brand, 3.0 hrs. disallowed;
7/29/82	Conference with Brand, .5 hrs. disallowed;
8/04/82	Phone calls to/from Shartis, 2.0 hrs. disallowed
9/06/82	Conference with Brand, .5 hrs. disallowed;
9/09/81	Conference with Brand, .5 hrs. disallowed;
9/23/82	Conference with Brand, .5 hrs. disallowed;
10/21/82	Conference with Brand, 1.0 hrs. disallowed;
10/22/82	Conference with Brand, 1.0 hrs. disallowed;
11/21/82	Conference with Brand, .5 hrs. disallowed;
6/28/83	Conference with Brand, .5 hrs. disallowed;

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Brand,[18] and hours claimed by Mr. Seligman[19] suffer from this deficiency and will not be figured into the lodestar

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8/04/83 Conference with Seligman, .5 hrs. disallowed;

10/24/83 Conference with Brand, .5 hrs. disallowed;

1/26/84 Conference with Brand, .5 hrs. disallowed.

[18] Below are noted the work descriptions in Mr. Brand's time summaries which this Court has found deficient and the corresponding deduction in time made:

10/21/81 Conference with Saperstein, .5 hrs. disallowed;

11/03/81 Conference with Saperstein, .5 hrs. disallowed;

1/06/82 Conference with Saperstein, .5 hrs. disallowed;

5/07/82 Conference with Saperstein, 2.0 hrs. disallowed;

5/10/82 Conference with Saperstein, 1.0 hrs. disallowed;

5/11/82 Conference with Saperstein, 3.0 hrs. disallowed;

7/29/82 Conference with Saperstein, 1.0 hrs. disallowed;

7/30/82 Phone call to/from Saperstein, .5 hrs. disallowed

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sum. Ms. Udell's entries are sufficiently detailed throughout to support the hours claimed.

b. *Composite Time Entries:* The time records of plaintiffs' counsel reflect the common and generally permissible time keeping practice of recording a day's activities with a single hourly figure, rather than assigning a precise time for each activity performed. Where compensation is arguably available for only some of the activities listed in a particular entry, plaintiffs' counsel have estimated the amount of time expended on the compensable matters. The defendants discredit the time thus claimed as insufficiently substantiated. We disagree.

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9/06/82 Conference with Saperstein, .5 hrs. disallowed;
9/13/82 Conference with Saperstein, .5 hrs. disallowed;
9/14/82 Conference with Saperstein, .5 hrs. disallowed;
9/23/82 Conference with Saperstein, .5 hrs. disallowed;
10/21/82 Conference with Saperstein, .5 hrs. disallowed.

[19] Below are noted the work descriptions in Mr. Seligman's time summaries which this Court has found deficient and the corresponding deductions in time made:

8/12/82 Phone call – Guy Saperstein, .3 hrs. disallowed;
1/26/84 Conference with Saperstein and Nelson, .5 hrs. disallowed;

The mere fact that plaintiffs seek compensation for estimated time does not defeat their claim. See Bonnette v. California Health and Welfare Agency, 704 F.2d at 1473; see also Ramos v. Lamm, 713 F.2d 546, 553 n.2 (10th Cir. 1983). Fee applications, after all, need not recite "the exact number of minutes spent." Copeland v. Marshall, 641 F.2d at 891. Where, as here, the estimates are based on detailed contemporaneous time records maintained in the normal course of business by plaintiffs' counsel, and are supported by the sworn declarations of counsel, we see no reason to arbitrarily disallow the estimated time claimed. To the extent, however, that the estimates appear to reflect overstatements or unreasonable expenditures of time, the estimated time will, of course, be disallowed. See Ramos v. Lamm, 713 F.2d at 553 n.2 ("The district court should give special scrutiny to any . . . estimates of time expended and make reductions when appropriate.")

c. *Inconsistently Recorded Time:* In a very few instances, the plaintiffs' four attorneys have inconsistently recorded the time they spent in meetings or conversations with one another.[20] Two kinds of inconsistencies appear. The first involves entries for activities which are not reflected in the records of all the supposed participants. To reflect the minor ambiguities caused by these discrepancies, we find it appropriate to reduce each attorneys' total hourly request by one hour. See Futaldo v. Bishop, 635 F.2d 915, 922 (1st Cir. 1980); International

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[20] The majority of the entries challenged on this ground have already been discounted because of insufficiently detailed work descriptions. As a consequence, the problem noted here affects only a tiny percentage of the hours claimed.

Travel, etc. v. Western Airlines, 623 F.2d at 1275; Hall v. City of Auburn, 567 F.Supp. at 1228; Kane v. Martin Paint Stores, Inc., 439 F.Supp. at 1056.

The second kind of inconsistency presented involves discrepancies in the amount of time assigned by participating attorneys to the same event. To correct the uncertainties caused by these entries, we have compared the differing times allotted and disallowed the excess time noted in the larger entry. See, e.g., Futaldo v. Bishop, 635 F.2d at 922; Hall v. City of Auburn, 567 F.Supp. at 1228. Accordingly, two hours are reduced from hourly total submitted by Mr. Saperstein,[21] three hours are reduced from the hourly total submitted by Mr. Brand,[22] and one-half hour is reduced from the hourly total submitted by Mr. Seligman.[23]

In sum, and based on our review of the record, we find that the deduction of hours made in this regard constitutes an appropriate and fair corrective device to reflect the ambiguities caused by the minor discrepancies noted.[24]

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[21] This deduction accounts for the differing amounts of time ascribed by Messrs. Saperstein and Brand to their conference of February 3, 1983.

[22] This deduction accounts for the differing amounts of time ascribed by Messrs. Saperstein and Brand to their conference of September 3, 1982.

[23] This deduction accounts for the differing amounts of time ascribed by Messrs. Seligman and Brand to their conference of August 20, 1982.

[24] In authorizing these deductions, however, we are aware that the kind of inconsistencies criticized above may simply

(Continued on following page)

d. *Rounded Time Figures:* The defendants next attempt to cast doubt on the trustworthiness of the time keeping practices used by plaintiffs' counsel by noting the predominance of half hour and full hour entries in the time records of Messrs. Saperstein and Brand. We find no merit in their criticism. Although we may infer from the presence of the rounded time figures that counsel routinely made minor adjustments in recording their time, this inference alone is far from sufficient to undermine the evidence trustworthiness and general accuracy of the records before us. "Plaintiff[s'] counsel, of course, is not required to record in great detail how *each minute* of his time was expended." Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1941 n.12 (emphasis added). Accordingly, we decline to make any disallowances of time on this ground.

e. *Conclusion:* In sum, and pursuant to our obligation to independently review the fee applicants' documentation and exclude those hours insufficiently documented, the following deductions are made:

(Continued from previous page)

reflect the exercise by individual attorneys of a kind of "billing judgment" in the initial recording of time. For example, an attorney may decide not to record time spent in a conference in which he or she was not a major participant. If such a time keeping practice is routinely used, the attorney would be well-advised to inform the court via notations in the time sheets or affidavit. Absent some explanation, it is appropriate to resolve the uncertainties and ambiguities caused by these discrepancies against the fee applicant.

ATTORNEY	HOURS REDUCED
Guy T. Saperstein	20.80
Jeffrey S. Brand	17.50[25]
Brad Seligman	2.30
Ruby S. Udell	1.00
	41.60

2. *The Number of Hours Reasonably Expended*

The next step in calculating an appropriate fee is to determine the number of hours reasonably spent by plaintiffs' counsel on the three compensable matters: discovery, sanctions and attorneys' fees. See Fed. R. Civ. P. 37(a)(4) (an applicant for attorneys' fees under Rule 37(a)(4) is entitled only to an award for time reasonably expended). In assessing the reasonableness of the hours expended by plaintiffs' counsel, the Court has considered the total number of hours reported by each lawyer, the number of hours devoted by each lawyer to the three compensable areas, and the level of experience of the individual lawyers enlisted to perform the various tasks described.

For the most part, the defendants and their counsel do not contest the reasonableness of the hours plaintiffs' counsel invested in these matters.[26] Their silence on this

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[25] An additional two hours is reduced from Mr. Brand's hourly total to reflect scattered entries in his time summary which are not supported by the contemporaneous time records.

[26] The challenge offered by the defendants and their counsel to the number of intra-firm conferences held by the plaintiffs' lawyers has been mooted by this Court's disallowance of many of those hours on other grounds.

score is well-taken. See Copeland v. Marshall, 641 F.2d at 904 (a party who "litigate[s] tenaciously cannot then be heard to complain about the time necessarily spent" by the opposition); Richardson v. Restaurant Marketing Associates, Inc., 527 F.Supp. 690, 700, 31 FEP Cases 1562 (N.D. Cal. 1981). This Court's independent examination of the hours devoted to the compensable matters indicates that they were reasonably expended. Moreover, this examination bears out our impression, gleaned from observing plaintiffs' counsel at the various stages of this dispute, that the four plaintiffs' lawyers have litigated these matters and marshalled their efforts with remarkable efficiency.[27]

Accordingly, we find that the following hours devoted by plaintiffs' counsel to these matters are compensable:

ATTORNEY	HOURS
Guy T. Saperstein	250.50
Jeffrey S. Brand	489.25
Brad Seligman	31.90
Ruby S. Udell	63.50
	835.15

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[27] For the purposes of clarity, we specifically reject the challenge offered by the defendants and their counsel to the one-third of an hour spent by plaintiffs' counsel in conversation with a reporter from the local legal paper on June 15, 1983. Recovery under Rule 34(a)(7) of the Federal Rules of Civil Procedure encompasses "all expenses, whenever incurred, that would not have been sustained had the opponent conducted itself properly." Aerway Laboratories v. Arco Polymers, Inc., 90 F.R.D. at 565-66. Further, inasmuch as the work description indicates that Mr. Saperstein's time was spent *responding* to a question from a local reporter, we find no grounds to question the reasonableness of the expenditure.

3. *Reasonable Hourly Rates*

We are next charged with fixing a reasonable hourly rate for each of the plaintiffs' four attorneys. In establishing appropriate rates, we have considered a number of factors, including: (1) the hourly rates at which the plaintiffs' counsel customarily and currently bill their clients, (2) the hourly rates prevailing in the community for attorneys of similar experience, reputation, and skill, working on cases of similar complexity, (3) the hourly rates fixed by this Court, and other courts in this district, in calculating recent fee awards in similar cases, and (4) our analysis of the level of performance and skills of each of the plaintiffs' lawyers, based on our familiarity with their written and oral presentations in this Court.

The reasonableness of the rates requested by plaintiffs for the services of their counsel is fully supported by the record.[28] The requested rates are well within the range of those prevailing in this community for lawyers of comparable qualifications handling similar cases. See supra at pp. 7-8. Moreover the declarations attesting to the extensive experience and expertise of plaintiffs' counsel confirm what this Court has observed firsthand during the course of this dispute. Accordingly, we find it entirely appropriate to use the hourly rates requested by

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[28] The defendants do not challenge the adequacy of the factual showing made by the plaintiffs in support of the hourly rates requested – and rightly so. The plaintiffs have submitted specific evidence of the requested rates, see supra at pp. 6-7, evidence which has not been countered by the defendants or their counsel in any way.

the plaintiffs, and stated below, in calculating the lodestar sum:[29]

ATTORNEY	HOURLY RATE
Guy T. Saperstein	$165.00
Jeffrey S. Brand	165.00
Brad Seligman	125.00
Ruby S. Udell	110.00

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[29] These hourly rates reflect current billing rates, rather than those in effect at the time the various services were performed. Our decision to base this fee award on current, rather than historical, rates reflects our conclusion that use of the current hourly rates in this case "directly adjusts the award for the combined effects of delay in payment and inflation." Hanguard, Inc. v. Ethicon, Inc., 552 F.Supp. 820, 823 (N.D. Cal. 1982) (J. Weigel); see also Ramos v. Lamm, 713 F.2d at 555. Indeed, were we to calculate the fee using historical rates, adjusted upward to account for inflation and delay, see Richardson v. Restaurant Marketing Associates, Inc., 527 F.Supp. 690, 31 FEP Cases 1562 (N.D. Cal. 1981) (J. Patel), it appears that the final sum would be virtually identical to, or larger than, the fee calculated according to current rates. As such, in this case, we fully agree with those courts which have found that use of current rates simplifies the fee calculation and roughly counterbalances inflation and delay, without any attendant unfairness. See, e.g., Hanguard, Inc. v. Ethicon, Inc., 552 F.Supp. at 823; Ramos v. Lamm, 713 F.Supp. at 555; In re Ampicillin Antitrust Litigation, 81 F.R.D. 395, 402 (D.D.C. 1978).

Moreover, we find no merit in the protest of the defendants and their counsel that use of current hourly rates in calculating a fee award under Rule 37(a)(4) somehow transforms the nature of the award from compensatory to punitive. The lodestar sum – calculated according to adjusted historical or current hourly rates – is purely compensatory. It is only when the lodestar is adjusted by use of a multiplier that the award reflects factors other than the reasonable expenses incurred by the fee applicant.

4. *The Lodestar Sum*

Pursuant to the calculations entered above, the lodestar sum in this matter is $133,031.25. This figure is calculated as follows:

ATTORNEY	HOURS	HOURLY RATE	TOTAL
Guy T. Saperstein	250.50 @	$165.00	$ 41,332.50
Jeffrey S. Brand	489.25 @	165.00	80,726.25
Brad Seligman	31.90 @	125.00	3,987.50
Ruby S. Udell	63.50 @	110.00	6,985.00
			$133,031.25

5. *The Extent of the Plaintiffs' Success*

The Supreme Court has declared that if a fee applicant fails to prevail on claims "unrelated" to those on which he or she succeeds, the time expended on the unrelated and unsuccessful claims cannot be compensated. Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1940-43. The non-prevailing matter with which we are concerned involves the one-page document referred to as the "Madsen memo." See supra at p. 4.

We agree with the defendants and their counsel that this minor matter is "distinct in all respects" from the other claims of discovery abuse successfully pursued by the plaintiffs, Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1943. Accordingly, a deduction in the lodestar sum is appropriate to reflect the hours spent on the unsuccessful claim. Determination of the appropriate reduction is committed to the sound discretion of the district court, Hensley v. Eckerhart, 461 U.S. at ___, 103 S.Ct. at 1941, and may involve "inherenty imprecise"

calculations. Laffey v. Northwest Airlines, Inc., 572 F.Supp. at 361.

Based on this Court's review of its notes, those portions of the record involving the Madsen memo, and the Court's recollection of the very small role played by this matter in the disputes litigated here, we conclude that a flat reduction of $2000.00 in the lodestar sum equitably reflects the plaintiffs' failure to prevail on this matter. Accordingly, the lodestar sum of $133,031.25 will be reduced by $2000.00 to account for the plaintiffs' lack of success on the Madsen memo issue.

5. *The Reasonable Award*

Based on the preceding analysis, we conclude that the plaintiffs are entitled to attorneys' fees in the amount of $131,031.25.

Further, we conclude that the costs requested by the plaintiffs are adequately documented, reasonable and compensable. Accordingly, plaintiffs are entitled to costs in the amount of $908.50.

III. ORDER

For the reasons stated above, IT IS HEREBY ORDERED that:

1. Within fifteen (15) days of the date of this Order, attorneys' fees of $131,031.25 and costs of $487.50 shall be paid to the plaintiffs. Thus sum of $131,518.75 shall be shared equally by the defendants and their counsel.

2. Within fifteen (15) days of the date of this Order, the defendants' counsel shall pay to the plaintiffs the $421.00 in costs associated with the deposition of Elizabeth Milrod. See June Sanctions Order, 32-33:15-18.